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VIRGINIA APPEALS

The Earliest Report of All Current Decisions of The Supreme Court of Appeals

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VIRGINIA APPEALS

APPALACHIAN POWER COMPANY *v.* COMMONWEALTH, EX REL NATIONAL CARBIDE CORPORATION

(*Richmond, January 19, 1922.*)

1. STATE CORPORATION COMMISSION—Record—Certificate of Facts—Appeal—Constitution, sec. 156-f.
2. IDEM—Constitutional Law—Due Process—Opportunity to be Heard.

Appeal from State Corporation Commission.

Remanded.

Robt. E. Scott, for the appellant.

John S. Draper and *H. T. Hall,* for the appellee.

Kelly, P., absent.

SIMS, J.:

This is an appeal of the Appalachian Power Company from an order, or judgment, of the State Corporation Commission, entered on April 13, 1921, in the proceeding instituted by the National Carbide Corporation by its petition, filed before the Commission on January 11, 1921, praying that the rates for electric power furnished the latter by the former, (which were 3.3 mills per kilowatt hour for secondary power, the Power Company guaranteeing to furnish the Carbide Company with not less than 10,000,000 kilowatt hours of secondary power per annum, and 7.2 mills per kilowatt hour for primary power), be reduced to 6 mills per kilowatt hour for primary power, and that the rate for secondary power remain at 3.3 mills per kilowatt hour, but that the Power Company be required to guarantee to furnish the Carbide Company not less than 15,000,000 kilowatt hours of secondary power per annum,—which would have the practical effect of reducing the rate on secondary power also.

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It appears from the record that by agreement in writing between the two companies, of date July 25, 1917, the Carbide Company undertook to forthwith design and construct a plant for the production of calcium carbide at or near Ivanhoe, Va., within two miles of the Power Company's hydro power station No. 4, and fully equip such plant with an initial installation of three electric furnaces of the electric power consuming capacity of approximately 15,333,333 kilowatt hours each, or approximately 46,000,000 total kilowatt hours, per annum; to purchase such power of the Power Company and pay therefor 3.3 mills per kilowatt hour for the secondary and 6 mills per kilowatt hour for primary power, the minimum charge to be $50,000.00 per year which should begin to run and be effective from the date of the completion and putting into operation of the Power Company's then proposed new steam plant at Glen Lyn, Va., but not earlier than March 1, 1918. Such agreement provided that the Power Company would supply to the Carbide Company all the power necessary and required for the operation of said plant, such power to consist of primary power and secondary power, secondary power being, for the purposes of the agreement, defined to be the hydro, or water generated electric power which the Power Company "may have available from time to time over and above the requirements of all its other customers;" all other power, however obtained, being for the purposes of the agreement, defined to be primary power, the Power Company to be the sole and exclusive judge of whether or not and when it has secondary power available, its judgment in the premises to be conclusive and binding upon the Carbide Company, and the Power Company guaranteed that it would furnish to the Carbide Company not less than 15,000,000 kilowatt hours of secondary power per annum.

This agreement by its terms was to be in force until March 1, 1923, with the option to the Carbide Company to renew the agreement for a further period of five years, the rates, however, for such further period to be fixed in a cer-

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tain way set forth in the agreement, based on the then prevailing cost of coal.

At the time this agreement was entered into the business of the Power Company had been in operation only about five years, and was in process of development, which process was expected to continue and did thereafter continue up to the time of the entry of the order, or judgment, of the commission under review; and, as appears from the record, is likely to continue to further develop for many years in the future if it is allowed to receive a fair return upon the money it has actually invested and which good business judgment may require to be and is actually further invested in the business in order to supply the growing demands of the public which it serves.

The Power Company filed its answer and evidence was introduced both in behalf of the complainant and respondent. By the pleadings and the proof there were a number of issues of fact before the commission. But there is no certificate of the findings of fact by the commission, nor any opinion or any statement of the reasons upon which the action of the commission appealed from was based; both of which are required by clause f of section 156 of the Constitution. We have no means of knowing what issues of fact the commission considered as material to its decision; what its findings of fact were on any issue; or what any of its conclusions of law were upon the issues of law presented.

1 }

We have nothing before us but the order of the commission appealed from and such portions of the evidence as have been certified in the record, much of it conflicting, and some if it conflicting on subjects about which experts seem to differ. Seemingly important exhibits referred to in the testimony of witnesses as filed in evidence have been left out of the record. If there were a certificate in the record of facts found by the commission, that, under the provisions of the Constitution on the subject, would evidence *prima facie* what such facts are; and the holding of such

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prima facie case to be conclusive as to all the facts not appearing to the contrary from the record as presented on the appeal, would be a result of which the appellant could not complain. But where on the appeal there is neither a complete record, nor a certificate of facts found, it is impossible for the appellate court to ascertain what the facts are.

The order appealed from states that the case was heard before the commission "upon the testimony and briefs of complainant and respondent and upon the report of the commission's engineer," and the chairman of the commission certified, under date of May 4, 1921, "that the *following* contains and sets out all of the facts and evidence upon which the action of the commission in the said proceeding was based, and which are essential to a proper decision of the appeal to be taken from such action." (Italics supplied.) This certificate is at the conclusion of the whole record as printed and presented on appeal, except the certificate of the clerk of the commission that proper notice was given of the intention to apply for a transcript of the record as the basis for appeal as required by statute, and except the report of the commission's engineer, Judson C. Dickerman, which is referred to in said order, which report is dated March 28, 1921, was filed with the commission that day, is certified by the chairman of the commission under date July 22, 1921, and appears at the end of the printed record.

We of course look to the substance and not to the mere form of the certificates just mentioned. We take the certificates to refer to what appears preceding and not "following" the certificate. It is, however, a certifying of the evidence merely, and not of any facts within the meaning of the constitutional requirements aforesaid.

In the absence of any finding of facts by the commission or any opinion of the commission or statement of the reasons upon which its action appealed from was based, touching the questions involved in the case, we cannot with proper efficiency undertake to consider and determine "the reasonableness and justness of the action of the commis-

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sion." Indeed, under the above mentioned provisions of the Constitution on the subject, it may be seriously questioned whether we have the jurisdiction to do so. Certainly if we did undertake to do so, we would set at naught the plain provisions of the Constitution on the subject.

Clause f of section 156 of the Constitution, in reference to appeals from the State Corporation Commission, so far as material, provides as follows:

"* * * the chairman of the commission, under the seal of the commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, * * *. The commission shall, whenever an appeal is taken thereform, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from is based, and *such statement shall be read and considered by the appellate court upon disposing of the appeal.* The appellate court shall have jurisdiction *on such appeal* to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal; provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct, * * *." (Italics supplied.)

These constitutional mandates should be obeyed both by the commission and ourselves in all cases, including the case before us. As the Constitution gives to the action of the commission appealed from, the *prima facie* presumption of correctness, it is plain that it intends that the commission shall certify both the facts found and shall also state the conclusions reached, upon which the action appealed from is based, separately from the evidence certified, otherwise it would be impossible for the appellate court to know to what facts or conclusions to give such presumption. Moreover, the language of the Constitution expressly requires this to be done. The certificate of facts also should be in

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such detail, by schedule or otherwise, as to the several items which must be considered by the commission in reaching its decision, as to show such items separately.

Further: It appears from the record that the tariff of rates fixed by the order appealed from follows *verbatim* the tariff recommended by the report of the commission's engineer, Judson C. Dickerman, which was dated and filed before the commission on March 28, 1921, as aforesaid, but a few days before the order appealed from was entered that such tariff departed radically in character from the tariff concerning which issues were made by the pleadings and upon which all the proof both for complainant and respondent was taken, in that it does not fix separate rates upon primary or secondary power, as both complainant and respondent contemplated would be done, but a uniform flat rate, not dealt with by the pleadings or the proof; and that neither complainant nor respondent were given any opportunity to consider or object to such report or its conclusions before it was considered by the commission.

2 }

One of the assignments of error before us by the Power Company is that the commission erred in receiving said report and in considering same, because—

"(a). It was made and returned without notice to your petitioner and received and considered without any opportunity to it to except thereto or to controvert its findings;

"(b). Its findings of facts are contrary to the evidence produced before the commission and without evidence to support them; and

"(c). The rate recommended by said report is unjust, insufficient and confiscatory, and, if put into effect, will deprive your petitioner of its property without just compensation and without due process of law, contrary to the Constitution of the United States in such case made and provided."

We think that this assignment of error is certainly in part well taken. In view of the fact that the report in question recommended a different kind of rate schedule from

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that contemplated by the pleadings and with reference to which the proof for both the Power Company and the Carbide Company was taken, the action of the commission in considering such report and in adopting the rate thereby recommended, without any opportunity given the Power Company of considering such report, or the subject of the uniform flat rate, which was fixed by the order appealed from, or of presenting its views on the subject by exception to such report, or otherwise, before the order appealed from was entered, amounted to a denial of a hearing to the Power Company on the subject. That is to say, the commission in such action deprived the Power Company of due process of law.

The case will have to be remanded to the commission for further proceedings. That being so, as the evidence in the record with reference to many of the elements entering into the expected cost of the service following the entry of the order appealed from and with reference to the actual net return to the Power Company expected to result from the rates which have been in force since that order was entered, was necessarily speculative, because of the dates at which it was introduced, the accuracy or inaccuracy of which can now be checked up by comparison with actual conditions and results which have followed the entry of said order down to the time at which the case is again taken up by the commission for further consideration, we feel that we should say (practically in the language of another portion of clause f of section 156 of the Constitution not above quoted), that we deem it necessary, in the interest of justice, to require the case to be further investigated by the commission and reported upon to the court, in the event of the appeal being still insisted upon by appellant, (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

The case will accordingly be remanded to the commission for further proceedings, and for certificate of facts upon

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which the final action of the commission may be based, and for a written statement by the commission of the reasons upon which such action is based, in the event of an appeal being still insisted upon by appellant, all in accordance with the views expressed in this opinion. Meanwhile, the appeal will be considered as still pending in so far as the respective rights of the two companies are concerned, and no order as to costs will be entered at this time.

Remanded for further proceedings.

ATKINS *v* COMMONWEALTH.

(Richmond, January 19, 1922.)

1. SEDUCTION—Evidence—Promise of Marriage—Corroboration—Presumption of Chastity.
2. IDEM—Instructions—Part of Evidence—Corroboration—Proof.
3. IDEM—Evidence—Hearsay—Harmless Error.

Error to Circuit Court of Halifax county.

Affirmed.

Jas. H. Guthrie, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

KELLY, P.:

The indictment in this case charged that on the 26th day of June, 1921, in Halifax county, "W. W. Atkins, being a married man, * * * did then and there unlawfully and feloniously seduce and have illicit connection with one K. L. Yates, * * * an unmarried female of previous chaste character."

The case was tried twice. At the first trial the jury found the defendant guilty and fixed his punishment at two years in the penitentiary. This verdict, on motion of the defendant, was set aside. At the second trial he was

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again found guilty, and his punishment was fixed by the jury at five years in the penitentiary. The court refused to interfere with the second verdict, and passed sentence on the defendant in accordance therewith.

There are three assignments of error set out in the petition. We shall take them up in their inverse order.

1. It is contended that the court erred in refusing to set aside the verdict on the ground that it was contrary to the law and the evidence.

Upon the vital and determinative questions of fact, there is the conflict of testimony between the prosecutrix and the accused so commonly encountered in cases of this character. It is not necessary to set out the evidence in full. The following statement is sufficient for a proper disposition of the case:

The defendant was a married man, having a wife and children living at South Boston. He was employed by the Coca-Cola Company as a traveling salesman, and as such seems to have had his headquarters first at South Boston and later at Leaksville, N. C., The prosecutrix was an unmarried woman, twenty years old, who with the assistance of a younger sister, conducted a store owned by her invalid father. This store was in the territory in which the defendant sold and delivered Coca-Cola so long as he had his headquarters at South Boston. She testified that for six or seven months before the alleged seduction she saw him at the store two or three times a week; that he told her he was unmarried; that five months after she first met him he proposed marriage; that she declined the first proposal, but that on being asked the second time she agreed to marry him; that two months in advance they agreed on June 26, 1920, as the date for the marriage; that on June 26, 1920, after having written her that week two letters (which she says she destroyed) saying he was coming after her on that date, he came for her at night; that they walked to Clover, a railroad station about four miles from the store; that on the way to Clover he said they would take the train there

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for Randolph where people would not know them, and go thence by next train to Leakesville, N. C., and be married; that on the way to Clover that night, after they had gone about three miles, he asked her to have intercourse with him but she declined; that when they arrived at Clover they found no one at the station; that he then asked her again to have intercourse with him, which she at first refused, but to quote her language, "he said we were going to be married anyhow—and he forced me—he overpowered me. He said we would leave at 3 o'clock. Father did not know where I was. He said he was going to leave me if I didn't have intercourse with him. I was four miles from home and it was 3'oclock in the morning." They left Clover by train and arrived at Randolph before daylight. At the latter place they had intercourse again, and, according to her statement, he made there "the same threats that he made at Clover." Later in the day they left by train for South Boston. Before leaving Randolph he told her he would get off at South Boston and see his wife and children. This she says was the first she had ever heard of his being married. She left South Boston that evening afraid to return to her people at home, and went to Richmond, where she remained at a boarding house until her brother-in-law came after her.

The case is peculiar in some of its particulars. The defendant is a married man, but his conviction was sought and obtained upon the theory that he seduced the prosecutrix under promise of marriage, following upon a false representation that he was a single man. The offense is charged in the indictment, quoted above, in the language of the statute (Code, sec. 4410), and as thus charged a promise of marriage is not a necessary element of the crime. But the conviction in this case necessarily depends upon proof of a promise of marriage, for the evidence relied upon to support the charge of seduction is inseparably linked with the claim that such a promise was made. If the proof of the promise of marriage fails, then the foundation of the case sought to be made by the Commonwealth is gone.

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The testimony of the prosecutrix is in conflict with that of the witness, Huckabee, a mutual acquaintance and friend of the defendant and the prosecutrix, who testified that he told her before she met defendant that the latter was married; and her testimony also in conflict with that of the defendant who denies the promise of marriage, and says that she knew all the while that he had a family at South Boston. These conflicts, however, were settled by the verdict of the jury, and we cannot interfere with their finding, provided her testimony is sufficiently supported by other evidence. (Code, sec. 4413.) This latter question, too, was concluded by the verdict, if we can say there is other evidence in the case, either direct or circumstantial, fairly tending to support the testimony of the prosecutrix upon the essential facts. *Riddleberger* v. *Commonwealth,* 124 Va. 783, 16 Va. App. 689.

The corroborating evidence does not appear to us to be very satisfactory or convincing, but it satisfied the jury, and we are of opinion that it was sufficient to bring the case within their province. There was little direct evidence, except by the prosecutrix, of any courtship or love-making between the parties, but they saw each other several times a week for some time before the alleged seduction took place. Her chastity was presumed (Code, sec. 4410; *Harding's case,* decided to-day.) But more than this, her previous chaste character was established by entirely satisfactory proof. That their relations were not merely those of store manager on the one hand and salesman on the other is conceded; and it is a fair, if not a necessary inference from the evidence that he was very attentive to her, and that no other man paid her any attention from the beginning of their acquaintance to the date of her alleged seduction. On the day which she says they had agreed on as the date for their marriage, he admits that he journeyed from Leakesville, N. C., to Clover, in Halifax county, walking thence several miles to the Yates store. According to one of the witnesses, he carried

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a small valise. He denies having the valise, but whether he had any baggage or not, he was making a special trip to see her. After meeting her there, they left together and made the journey to South Boston, as above set out. They differ as to why they went. She says it was to reach North Carolina and get married. He says she told him she wanted to leave home, and that she went against his advice. But the fact remains that he came all the way from Leakesville, N. C., to see her on the day she says they had agreed to marry, and that they went off together that night. It is his claim that he had often been intimate with her in the bushes near the store prior to that date, but he does not offer to explain the apparently admitted fact that he did not have intercourse with her that night until after he had walked with her in the dark through the country, four miles to Clover.

We may concede, however, that if the corroborating evidence went no further than hereinbefore appears, we would have to hold, as we did in *Riddleberger* v. *Commonwealth, supra,* that it is "as consistent with the conclusion that there was no promise of marriage as with the conclusion that there was such a promise." But there was the additional testimony of Sam Boyd, which though contradicted by the defendant, may properly and reasonably have been believed by the jury, and which was wholly inconsistent with any other theory than that the defendant was holding himself out as the sweetheart and finance of the prosecutrix. Boyd testified as follows:

"I know Katie L. Yates. Have known her about eleven years. In going down the street in South Boston sometime in the spring of last year W. W. Atkins jumped on the running board of my automobile, and asked me if I had been down the country, and if I saw his girl, Miss Katie Yates. He said she was the best looking girl in the county, and he intended to take her away from there. My son married Katie Yates' sister some two years ago."

If this incident took place—and whether it did or not

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was a question for the jury—it can only be reasonably explained on the theory that the defendant was assuming to Boyd the role of an unmarried man, a suitor of a sister-in-law of Boyd's son, and further that he was pretending that he intended to make her his wife. In no other guise could he have decently referred to her as "his girl," or have lawfully "intended to take her away from there." This statement to Boyd, especially in view of the relationship of Boyd's son to the prosecutrix, cannot be said to be as consistent with the conclusion that there was no promise of marriage as with the conclusion that there was such a promise. We think this testimony, taken with the other facts and circumstances above adverted to, constituted independent evidence which fairly tended to corroborate the prosecutrix upon the essential elements of the crime. This being true, the credibility of the story as told by her was a question for the jury. Their finding established the truthfulness of her narrative, and it follows that the court did not err in refusing a new trial on the ground that the verdict was contrary to the law and the evidence. If her story was true, the defendant was plainly and indefensibly guilty.

2. It is insisted that the court erred in giving instruction No. 2 offered by the Commonwealth; which was as follows:

"The court instructs the jury that while they cannot convict the accused on the uncorroborated testimony of the prosecutrix Katy L. Yates, yet if the admissions of the accused and other surrounding circumstances substantiate her testimony so as to satisfy their minds of the truth of her statements, then this is sufficient."

It is urged that this instruction improperly singled out a part only of the evidence, to-wit, the admissions of the defendant; that it improperly commented upon the weight and sufficiency of the evidence; and that it referred to the "surrounding circumstances" in such a broad and unlimited manner as to make the instruction erroneous.

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These objections are without merit. If it be conceded that either or all of them are well founded when the instruction is regarded by itself, they become of no importance when it is read, as it must be, with the instruction given by the court on its own motion as follows:

"The court instructs the jury that the accused cannot be convicted upon the testimony of the female seduced unsupported by other testimony. Without undertaking to indicate the precise amount of corroborating testimony, which in this case would be sufficient, the court tells the jury that it must be evidence which does not emanate from the mouth of the seduced female, that it must not rest wholly upon her credibility, but must be such evidence as adds to, strenghtens, confirms and corroborates her."

The two instructions are not, as is claimed on behalf of the defendant, in conflict with each other, and when read together correctly inform the jury as to the character of proof necessary for conviction.

We have looked to the authorities cited and relied upon by the learned counsel for the prisoner in support of the alleged error under consideration. They are not applicable to this case, and require no discussion here. We find no fault with the legal propositions invoked on behalf of the accused. It is well settled that instructions must not single out certain facts and direct the jury to base a verdict thereon, to the exclusion of other material facts in the case; that they must not be so inconsistent and conflicting with each other as to mislead or confuse the jury; and that they must not contain such a vague and indefinite and unexplained reference to "the circumstances of the case" as will tend to turn the jury loose in the field of speculation and conjecture. But nothing of that sort is to be found in the instructions given in this case when they are fairly considered as a whole. They guarded every right of the accused, and the jury could not, as the intelligent men they must be presumed to have been, have been misled to the prisoner's prejudice by anything contained therein.

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3 The third and last assignment of error questions the ruling of the trial court in admitting certain testimony given by the witnesses, N. G. Terry and Donald Lacks.

(a) Terry, after having testified that he was chief of police in South Boston and saw the prosecutrix there about one o'clock on June 27, 1920, was permitted over the objection of the prisoner to say that she then and there told him "that she had no people in South Boston, and was on her way to some place in North Carolina; that she had a kinsman up there and had started to North Carolina to get work."

(b) Lacks after having testified that he saw the prosecutrix at his home in Randolph, early one morning in June, 1920, was permitted, over the objection of the prisoner, to say that she told him "she was going to South Boston and then that evening she was going to Leakesville, N. C."

It is insisted that the court erred in allowing the above recited testimony to go to the jury, and that the judgment of conviction ought for that reason to be reversed. The ground upon which the objection to this evidence was based was that "the statements, not having been made in the presence and hearing of the accused, were hearsay and inadmissible as evidence against him."

It is a well settled general rule (subject to certain exceptions not applicable here) that the declarations of a witness made out of court are not admissible for the purpose of coroborating his testimony in court, for the reason that such evidence is hearsay. *Oliver* v. *Commonwealth*, 77 Va. 590; *Howard* v. *Commonwealth*, 81 Va. 488; *Repass* v. *Richmond*, 99 Va. 508; *Jessie* v. *Commonwealth*, 112 Va. 887, 890, 5 Va. App. 373. It is equally well settled, however, that a judgment will not be reversed for the admission of improper testimony, unless such testimony appears to have been capable of prejudicing the losing party. *Oliver* v. *Commonwealth*, *supra*.

We have no hesitancy whatever in holding that the above recited testimony of the witness, Terry, could not have

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been harmful to the defendant. The statement which he said the prosecutrix made to him did not tend to corroborate her story of a wedding trip to North Carolina. On the contrary, the statement showed that she was going on an entirely different mission, and was thus favorable rather than unfavorable to the defendant.

At first view, there appears to be more difficulty with reference to the testimony of the witness Lacks. The statement made to him by Miss Yates, without indicating why she was going, did show that she was on the way to Leakesville, N. C., and that is where she had testified they were going for the purpose of being married. It would be possible, therefore, to look upon this evidence as corroborative of her story in court. We do not think, however that the jury would have accorded it any such effect. To have done so, they would have had to believe that at the time she made the statement to Lacks she still thought she was going to Leakesville *to be married.* She could not have had any such belief at that time, because she also told Lacks, in the same conversation, that she was going to stop at South Boston. No stop at that place had been contemplated by her until after the defendant had told her for the first time that he was married and was going to stop there to see his wife and children. In other words, she had learned when she was talking to Lacks that a legal marriage between her and the defendant was not possible, and if she then intended to go to Leakesville, it was not as a part of the previous plan between her and the defendant about which she testified in court.

If, however, it can be supposed that the jury might have regarded her statement to Lacks as corroborative of her narrative in court, it was such corroboration as they were plainly told by the court to disregard. If it was corroboration, it "emanated from the mouth of the seduced female," and the jury had been expressly told by the court that such corroboration was not sufficient to warrant a conviction.

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We are of opinion that there was no reversible error in the admission of the testimony in question.

For the foregoing reasons, the judgment complained of must be affirmed.

Affirmed.

BREEDLOVE V. HARDY.

(*Richmond, January 19, 1922.*)

1. ACTIONS—Damages for Killing Dogs—Evidence—Instructions—Property Rights of Owner—Code 1919, sec. 2324—Acts 1918, p. 622.

Error to Circuit Court of Lunenburg county.

Reversed.

Geo. E. Allen, for the plaintiff in error.

Blaine F. Harman and *W. L. Welborn,* for the defendant in error.

PRENTIS, J.:

This is a motion, the object of which is to recover the value of two dogs, alleged to have been wrongfully, unlawfully, intentionally and deliberately shot and killed. There was a verdict and judgment in favor of the defendant, and the plaintiff assigns error. It is clear that such an action can be maintained, it being well settled at common law that the possession of a dog vests the owner with such a base or qualified property as that he can maintain a civil action for the unlawful conversion, destruction or injury thereof. *Commonwealth* v. *Maclin,* 3 Leigh (30 Va.) 810; *Davis* v. *Commonwealth,* 17 Gratt. (48 Va.) 618. By statute in Virginia (Code 1919, sec. 2324) dogs which have been assessed with a license tax which is not delinquent, are personal property, and may be the subject of larceny as well as of malicious or unlawful trespass.

Where the proof of the killing of the dog is clear, the burden is then upon the defendant who justifies his action

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to show the necessity therefor. In this case the defendant justified the killing because he claimed that it was necessary in order to protect his turkeys and chickens from repeated attacks and injuries by these dogs. His right may be thus defined: The owner of domestic animals or fowls has the right to defend them from injury or destruction through the attacks of other animals, but the extent of such right of defense necessarily depends on the circumstances and necessities of the particular case—that is, whether or not the right is reasonably or properly exercised, so as to make it lawful and justifiable.

In *State* v. *Smith,* 156 N. C. 628, 72 S. E. 321, 36 L. R. A. (N. S.) 910, it is said to be the settled law in that jurisdiction, "That an action may be maintained to recover damages for the unlawful killing or injuring of the dog of another, but if the dog is in pursuit of a domestic animal, and 'if the danger to the animal whose injury or destruction is threatened be iminent or his safety presently menaced, in the sense that a man of ordinary prudence would be reasonably led to believe that it is necessary for him to kill in order to protect his property, and to act at once, he may defend it even unto the death of the dog or other animal which is about to attack it." *Scott* v. *Cates,* 175 N. C. 336, 95 S. E. 552.

As a general proposition it may be said that where this defense of the right to kill is made, the question is one of fact for the jury, to be decided after due consideration of all of the peculiar circumstances relating thereto. *Hubard* v. *Preston,* 90 Mich. 221, 51 N. W. 209, 30 A. S. R. 426, 15 L. R. A. 249; *Ten Hopen* v. *Walker,* 96 Mich. 236, 55 N. W. 657; 35 A. S. R. 598; 67 A. S. R. 295, note; 1 R. C. L. 1124; *Thurston* v. *Carter,* 112 Me. 261, 92 Atl. 295, L. R. A. 1915C, 359; *Crow* v. *McKown,* 192 Ala. 480, 68 So. 341, L. R. A. 1915E, 372.

The defendant having testified that he knew these dogs very well, but did not know to whom they belonged, and that they had been coming out every day or two during the

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whole summer disturbing his turkeys; that they frequently came on his place and ran his turkeys away, and that on the morning on which they were killed, they had driven his turkeys off, over on a neighbor's premises; that he got his gun and went over in the field where they were and found them after his turkeys, though when he got close enough to shoot they had stopped chasing them; the case presents a question for the jury as to whether or not a man of ordinary prudence would be reasonably led to believe that it was necessary for him to kill the dogs in order to protect his property. No hard and fast rule can be laid down, but in such cases the parties must generally accept the verdict of the jury. While the defendant had the right to kill these dogs, if necessary, in the defense of his property, he had no right to kill them wantonly, or if his property could be reasonably protected without such killing. So that, if we had only to determine whether the court erred in refusing to set aside the verdict of the jury, we would, with some hesitation, affirm the judgment.

The other errors assigned relate to the instructions, and in a case like this the jury should be so clearly instructed as to leave them in no doubt as to their duty. The instructions here given appear to be both confusing and conflicting, but the only one to which it is necessary to direct special attention is instruction No. 2, which reads thus:

"The court further instructs the jury, that although they may believe from the evidence that the defendant did kill the plaintiff's dog or dogs, yet if the jury further believe from the evidence that at the time the defendant killed the plaintiff's dog or dogs, the said dog or dogs was or were injuring or killing any domestic fowls belonging to the said defendant, under the statute law of Virginia, the life of said dog or dogs became forfeited, and it became the duty of the warden to kill said dog or dogs in any manner that he might see fit, and therefore the said dog or dogs became outlawed, and the plaintiff could not have any property right in the said dog or dogs which could be the subject of

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damages, and you must, *there*, find a verdict for the defendant."

This instruction appears to be based upon the statute, section 4, Acts 1918, p. 622, entitled: "An act to prevent damage and injuries by dogs, and to provide compensation to owners of stock so injured; to provide for license on dogs, and to provide for penalties for violation thereof," which provides among other things that it shall be the duty of the game warden in case "any dog be found killing, injuring, or chasing sheep, or injuring or killing any domestic animals or fowls," to kill such dog in any manner he may see fit. The instruction, it will be observed, is mandatory, to the effect that because it was the duty of the game warden under such circumstances to kill dogs, therefore these dogs became outlawed, and the plaintiff could not have any property right in them which could be the subject of damages, and upon these facts directed a verdict for the defendant. No authority is cited for this proposition and we are unable to justify such a conclusion. The statute relates to the duties and powers of the game warden. It does not refer to and was not intended to deny or in any way to affect the qualified property which the owner has in his dog, or to extend the right of a defendant to kill dogs in the defense of himself or his property. The question as to what would have been the rights of the game warden under the circumstances disclosed by this evidence does not appear to be involved, and there is nothing in the statute, so far as we apprehend it, which was intended to change the general doctrines applicable to cases like this. The jury may have obeyed this instruction and ignored every other doctrine of law properly applicable, or contained in the other instructions, and all the evidence in the case, except the statement that the dogs had chased the turkeys, and concluded therefrom that they were bound to find a verdict in favor of the defendant.

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This appears to us so clearly to harmful error against the plaintiff as to necessitate a reversal of the case and a resubmission of it to a jury under instructions which fully recognize the rights of the parties as herein indicated.

Reversed and remanded.

BURFORD v. COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. CRIMINAL LAW.—Jury—Use of One Jury for Trial of Two Cases Against same Person.
2. IDEM.—Evidence—Offer of Reward for Accomplice.

Error to Circuit Court of Campbell county.

Affirmed.

Duncan Drysdale and *L. Bradford Waters,* for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

BURKS, J.:

The plaintiff in error, hereinafter called the accused, was convicted of breaking and entering a railroad car and stealing therefrom household goods of the value of several hundred dollars, and was sentenced to the penitentiary for two years. On the day after the breaking the accused was arrested and confined in jail on the charge of shooting one Dotson. After his arrest a search warrant was issued and under it the house of the accused was searched for the stolen goods, and a large quantity of them was found in the loft over the kitchen, and several of the articles which were identified as parts of the stolen goods were found in the bureau drawer of the room of the accused and his wife. At the time of the breaking the accused was the owner of a pony and light wagon or

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buggy, and a man named Hobbs or Cobbs had been staying at his house for "almost a week." The breaking was done in the night time, and early the next morning tracks of a buggy or light wagon and small horse tracks like those of a pony were found near the door of the car which contained the goods and which had been broken open and entered. Two witnesses testified that about eleven o'clock on the night of the breaking they saw the pony of the accused hitched to the buggy or wagon pass from the direction of the car going in the direction of the house of the accused, that one man was driving and the other walking along by or behind the buggy. One of these witnesses testified that he recognized the accused as the driver, but did not know the other man, and that the buggy or wagon was loaded with "canned fruit and stuff." He also made further statements as to what he saw in the vehicle which are manifestly improbable and seemingly untrue. The other witness testified that he did not recognize either of the men with the wagon, but that he remarked to the first witness "yonder goes Mr. Burford." It was a bright moonlight night, and the distance from the witnesses to the accused when he was passing was estimated by different witnesses at from 25 to 75 yards. The weight of the testimony seems to be in favor of the shorter distance. The two witnesses were together at the time, and while one of them says he did not recognize the accused, they concur in the statement that the pony and vehicle were those of the accused. They also concur as to the time of the night and that two men accompanied the vehicle.

The accused and Hobbs or Cobbs were separately indicted for the offense. Hobbs or Cobbs disappeared shortly after the breaking, and rewards were offered for his arrest both by the county of Campbell, and the State of Virginia. The accused was tried and convicted of a felony at the same term at which the instant case was tried, and the same jury was used for both trials. The record does not disclose what the first offense was, but does show that he had

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been arrested and confined in jail for the shooting aforesaid, and it may be fairly inferred therefrom, in the absence of all evidence to the contrary, that this was the offense for which he was convicted.

1 }

It is assigned as error that the same jury was used for the trial of the instant case as on the trial of the other case. Just when this objection was made is not clear from the record. The bill of exceptions on this point is very brief and is as follows:

"On the trial of the issue involved in this case the court caused to be impaneled the same jury which had just tried and convicted the defendant on another charge, to which action of the court the defendant, by counsel, objected, which objection was overruled by the court and to which the defendant duly excepted."

The order of the court impaneling the jury makes no reference to any such exception, but simply states that the panel was "found free from all legal exception," that eight were stricken off and the remaining twelve sworn to try the case.

In the petition for the writ of error it is conceded that the authorities are against the petitioner's contention. It is there said:

"Whether it is error to use the same jury which has just convicted the defendant on another indictment is a question as yet undecided in Virginia. It is conceded that the authorities in foreign jurisdictions are adverse to the contention of your petitioner. (See note to *People* v. *Mol*, 68 L. R. A. 871, 880; 16 R. C. L. Subject Jury, Section 78), but in view of the long settled practice in Virginia to impanel a new jury when there are two separate charges to be tried involving the same defendant, and in view of the policy of this State to safeguard in every way the defendant's right to a fair, impartial and unbiased jury, it is respectfully submitted that this court should refuse to follow the rulings in other jurisdictions and should adopt a doctrine more consistent with absolute justice."

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When jurors have been carefully examined on their *voir dire* and it has been shown that they are in every respect fair and impartial, and can give an accused a fair trial on the merits, they are not disqualified to sit by the fact that at another time and on entirely different evidence they have been compelled as jurors to convict him of an entirely different offense in no way connected with the charge under investigation.

In *Page* v. *Commonwealth,* 27 Gratt. 954, some of the jurors who found against the prisoner on the issue of *autrefois acquit,* also served on the trial of his plea of not guilty and this was held not to be error as they testified on their *voir dire* that they had formed no opinion as to the guilt of innocence of the accused, and could give him a fair and impartial trial.

While we do not think that the practice of using the same jury to try an accused for different offenses is to be commended, we cannot say that it is error.

2 }

It is also assigned as error that the trial court admitted testimony to show that a reward had been offered for the arrest of Hobbs or Cobbs "who was alleged to have been with the defendant at the time of the alleged crime." In support of this assignment counsel for the accused rely upon 16 Corpus Juris 661 and cases cited, as follows:

"It cannot be shown, as against a defendant on trial, that an accomplice or a co-conspirator has fled or escaped since the commission of the crime. It also has been held not permissible to show that a co-conspirator or a co-defendant is out of the state and therefore cannot be apprehended. 16 Corpus Juris 661, citing *Lowman* v. *State,* 161 Ala. 47, 50 S. 43; *People* v. *Stanley,* 47 Cal. 113; 17 Am. R. 401; *Smith* v. *People,* 38 Colo. 509; 88 Pac. 453;*Mullins* v. *Comm.,* 3 Ky. L. 686; *State* v. *Sykes,* 191 Mo. 62; 89 S. W. 851; *State* v. *Barham,* 82 Mo. 67; *People* v. *Sharp,* 107 N. Y. 427; 14 N. E. 319; 1 A. M. S. R. 851; (rev. 45 Hun. 460); *Landers* v. *State* (Tex. Cr.) 63 S. W. 557; *McKenzie*

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v. *State,* 32 Tex. Cr. 568; 25 S. W. 426; 40 Am. S. R. 795; *Pulpus* v. *State,* 82 Miss. 548; 34 S. 2."

It is generally conceded that after the objects of a conspiracy have been accomplished, the subsequent acts and declarations of one conspirator cannot be given in evidence against a co-conspirator, and it may be further conceded that if the reception of inadmissible testimony may have prejudiced a defendant in a criminal prosecution, a verdict against him should be set aside; but no such result would follow where the court can plainly see that he could not have been prejudiced by the reception of such evidence. In the case at bar, the horse and vehicle of the accused were seen on the night of the breaking coming from the direction of the box car, drawing a load, and attended by two men. The accused was recognized by one witness for the Commonwealth as the driver of the vehicle, and a quantity of the stolen goods were found on the premises of the accused and part of them were in the bureau drawer in the room occupied by the accused and his wife. The case against the accused was so fully and completely made out that the evidence complained of could not have been prejudicial to him. If its admission was error it was harmless.

It is true that the defendant and his wife testified that they knew nothing of stolen goods being in the house, and accused testified that he was not out of the house during the night of the breaking, but all of this testimony was before the jury, and it was their peculiar province to determine the credibility of the witnesses and the weight to be given their testimony. They have done this and have found the accused guilty. There is abundant evidence to support the verdict, and the trial court properly refused to set it aside. We find no error in the judgment of the trial court, and it is accordingly affirmed.

Affirmed.

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CROSBY *v.* COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. INTOXICATING LIQUORS—Sale—Testimony of Accomplice—Purchaser of Liquor—Instructions.

Error to Corporation Court of city of Norfolk.

Affirmed.

N. T. Green, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

PRENTIS, J.:

Lee Crosby has been convicted of the illegal sale of intoxicating liquor. Robert Watkins, a witness for the Commonwealth, testified that the accused, in his house, sold him half a pint of whiskey; that immediately thereafter, as he was walking along a public street in the city of Norfolk, going towards his own home, he was arrested for the unlawful transportation of such whiskey, and that he was under indictment therefor. Dickens, a police officer, testified that he saw Watkins go into the house of the accused, remain three or four minutes, then come out and walk down the street; that he found in his possession half a pint of whiskey; that just before he saw Watkins go into the house, he saw the accused come to the window and look in both directions up and down the street. The only conflicting testimony is that of the accused, to the effect that he had not sold the whiskey to Watkins.

Only one error is assigned, namely, that the accused, by his attorney moved the court to instruct the jury orally to the effect that the said Watkins being an accomplice with the said defendant in the sale of the whiskey, his testimony should be received with caution, which request was refused by the court. It may be assumed that Watkins was an accomplice, and of this we have no doubt (*State* v. *Ryan,* 1

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Boyce (Del.) 223, 75 Atl. 869; *People* v. *Coffey*, 161 Cal. 433, 119 Pac. 901, 31 L. R. A. (N. S.) 704), and therefore the court should have given an instruction which embodied the principle contended for. The rule in this jurisdiction is that the jury as triers of the fact, may if they are satisfied of the guilt of the accused, convict him upon the uncorroborated testimony of a single accomplice, though it is well settled that the evidence of an accomplice should be received and acted upon by a jury with great caution. *Hunt* v. *Commonwealth*, 126 Va. 819, 19 Va. App. 545, 101 S. E. 896. While in this case the court should have supplied the omission in the instruction, and as amended have given it to the jury, still in view of the evidence we decline to hold the failure to do so to be reversible error. It clearly appears that the accomplice here was corroborated by the police officer, in that he saw the accused in the house just before the alleged transaction; that he saw the witness, Watkins, enter the house; and that he found the whiskey in the possession of Watkins the alleged purchaser; so that the occasion and opportunity for the crime as well as the possession of the whiskey alleged to have been purchased were all clearly shown. This, then, is not a case in which the accused has been convicted upon the uncorroborated testimony of his accomplice.

There is no other material fact shown in the record, and no ground for reversal is shown.

Affirmed.

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BURRUSS ADM'R ET AL *v.* NELSON'S EX'OR ET AL.

(Richmond, January 19, 1922.)

1. WILLS—Parol Executory Contract—Proof.

Appeal from Circuit Court of Orange county.

Affirmed.

Browning & Browning, for the appellants.
Shackelford & Robertson, for the appellees.

Burks and Saunders, JJ., absent.

KELLY, P.:

Robert P. Davis died in 1885, leaving a will the second clause of which was as follows:

"2nd: After the payment of my just debts and funeral expenses, I give to my beloved wife, Octavia Davis, all of my estate, both personal and real, for her sole use and benefit so long as she lives, and not to be subject to any debts, claims and demands of any future husband she may marry, and at her death to be disposed of as she may deem proper and best."

In *Davis* v. *Kendall*, 130 Va. , 23 Va. App. 103, 107 S. E. 751, this court held that by the above language the testator gave to Octavia Davis only a life estate with a power of appointment as to the reversion.

On October 27, 1913, Octavia Davis, then Octavia Nelson, made a will of which the first and eleventh clauses were as follows:

"First: After the payment of all my just debts and funeral expenses, I give and devise unto my great nephew, Hugh G. Burress, who has for many years resided with me, the tract of land on which I now reside, situated in the County of Orange, and known as "LINDEN." It being my intention by this devise to include all the land attached to the original tract owned by me, as well as any and all additions which have been purchased by me at any time during my occupancy at any time."

"Eleventh: For the purpose of carrying into effect the provisions of this will, my executor hereinafter named is

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vested with full power and authority to sell *and* real and personal estate of which I may die seized (save that devised under the first clause of this will to Hugh G. Burruss) and to convey the same in proper manner, and the purchasers thereof shall not be held liable to see the proper application of the purchase price of any real or personal property so sold."

In the year 1916 Mrs. Nelson added a codicil to this will which contained, among others, the following clauses:

"Second: Having by said will devised unto my great nephew, Hugh G. Burruss, the farm on which I reside, and known as "Linden" together with the other lands attached, I now give and devise unto the said Hugh G. Burruss, all the personal property of every description on or about the said farm, including all household and kitchen furniture, jewelry, furniture, fixtures, live stock of every description, all crops growing or severed, all farming machinery and implements, and in general all and every article of personal property owned or used by me on or about the said farm, whether the same be herein particularly described or mentioned."

"Fifth: The rest and residue of my estate, I give and devise unto my great-nephew, Hugh G. Burruss."

Hugh G. Burress died August 8, 1917, unmarried and without issue. Mrs. Nelson died February 16, 1918, and her will, with the codicil thereto, was duly admitted to probate.

In *Davis* v. *Kendall, supra,* it was held that the power of appointment had not been exercised as to the property in question, and that the same therefore passed to the heirs of Robert P. Davis. This holding was clearly sound. The appointment lapsed upon the death of Hugh G. Burruss, Code sec. 5238; 2 Min. Inst., 4th Ed., 820; 2 Min. Real Prop. sec. 1333, p. 1485; 22 Am. & Eng. Enc., 2nd Ed., 1139; 21 R. C. L. p. 805, sec. 39; 31 Cyc. 1141.

The present suit was brought by M. T. Burruss, administrator of Hugh G. Burruss, and H. C. Burruss, his father and sole heir and distributee. The decree complained of

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was rendered, and the appeal therefrom was allowed, before the case of *Davis* v. *Kendall, supra,* was heard and disposed of in this court. The bill alleged "that in the fall of 1896 the said Octavia Nelson agreed with the said Hugh G. Burruss that if he would care for her and manage her estate in her declining years, she would, upon her death, leave, grant or devise unto him the aforesaid Linden Farm, including the original purchase and all land thereto added by her subsequently to her husband's death"; that pursuant to this agreement, Hugh G. Burruss, then eighteen years of age, left his father's home, went to the Linden Farm, "and remained there constantly, caring for the said Octavia Nelson, and solely managing her said estate from thence for a period of twenty-one years or thereabouts up to August 8, 1917, when he, the said Hugh G. Burress, died, unmarried and without issue, leaving your orator's father, H. C. Burruss, his sole distributee and heir at law"; and that Hugh G. Burruss fully performed the agreement on his part except in so far as its further performance was prevented by his death.

The prayer of the bill, as amended, was as follows:

"That the will of the said Robert P. Davis may be construed and that the will of said Octavia Nelson may be construed; that the contract heretofore made and existing between the said Octavia Nelson and the said Hugh G. Burruss may be adjudicated, established and held firm and binding; that the said Hugh G. Burruss may be decreed to be the owner of the said Linden Farm and the residuary legatee and devisee of the said Octavia Nelson; that if there be any defect in the attempted execution of the power conferred by the will of the said Robert P. Davis on the said Octavia Nelson, that a court of equity may aid said defective execution of such power so as to fully effectuate and carry out the aforesaid contract of the said Octavia Nelson with the said Hugh G. Burruss and to carry out her intention in regard thereto;

"And as an alternative prayer, your petitioners pray that

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if said affirmative relief above prayed for be not granted unto them, then they pray that an accounting may be had and ordered between the executor of the estate of the said Octavia Nelson and the personal representative of the said Hugh G. Burruss and that fair and proper compensation for the services rendered by the said Hugh G. Burruss during his lifetime may be ascertained, adjudged and decreed."

The decree appealed from, in so far as material here, was as follows:

"And the court being of opinion that the alleged verbal contract set up in the bill of Hugh G. Burruss' administrator is not established by such evidence as is required to make a case for the relief of specific performance prayed for in said bill; that the case is not one for the alternative relief on a *quantum meruit* basis for services performed as prayed for in the said bill, the court doth accordingly adjudge, order and decree the complainant's bill of complaint be and the same is hereby dismissed."

The petition for appeal insists that Mrs. Nelson acquired a fee simple estate under the will of her husband, and discusses the case first upon that theory. This discussion is eliminated from further consideration by the decision in *Davis* v. *Kendall, supra.* The alternative contention in the petition is that "if she did not own the fee simple, then the result would follow the same if she had only life estate with a power of disposal at her death."

Under this latter contention some interesting questions were presented in argument, including that as to the validity and effect of an executory contract by the donee of a power to execute it in favor of a particular person; but before any other questions become material it is necessary to determine whether the alleged contract was established by requisite proof. The lower court held that it was not so established, and in that conclusion we concur.

The alleged contract was by parol. Its enforcement in equity depends upon clear and convincing proof.

In *Plunket* v. *Bryan,* 101 Va. 814, 818, Judge Harrison,

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speaking for this court, said: "The principles upon which a court of equity will avoid the statute of frauds and enforce a parol agreement for the sale of land are well settled. They are briefly but clearly stated in *Wright* v. *Puckett, supra,* to be as follows: '1st. The parol agreement relied on must be certain and definite in its terms. 2nd. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3rd. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. These requisites must concur before a court of equity will decree specific execution." The act or acts of part performance must be of such an unequivocal nature as of themselves to be evidence of the execution of an agreement. They must be such as could be done with no other view or design than to perform the agreement. They must unequivocally refer to and result from an agreement and be such as the party would not have done unless on account of that very agreement, and with a direct view to its performance. The act must be sufficient of itself, without any other information or evidence to satisfy the court from the circumstances it has created, and the relations it has formed, that they are only consistent with the assumption of the existence of a contract, the terms of which equity will enforce. Until acts are alleged which, of themselves, imply the existence of such a contract, parol evidence to show its terms is inadmissible. *Frome* v. *Dawson*, 14 Ves. 387; *Maddison* v. *Alderson* (House of Lords), 8 App. Cas. 467; *Phillips* v. *Thompson,* 1 Johns, Ch. 131; *Pierce* v. *Catron,* 23 Gratt. 588; *Hale* v. *Hale, supra.*"

The evidence relied upon to support the alleged verbal agreement in this case does not measure up to the foregoing tests.

Hugh G. Burruss, of course, did not testify, and no witness can be said to have testified to the contract except as a matter of deduction and opinion based on unconvincing facts.

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It was natural that Mrs. Nelson should have expected to do what she did in her will for Hugh G. Burruss, and she seems to have told him so. She had no children, he was her great nephew, he had lived with her and had been useful to her for many years, and she was devoted to him. But he had a good home with her, and she paid him at the rate of $150 a year in money. His long stay there appears from the evidence to have been just as consistent with a mere hope and belief that he would eventually get the farm as with a definite contract to that effect. The proof of the contract is not clear, and his acts and conduct were not such as to unequivocally refer to and result from such a contract.

To adequately state and analyze all of the testimony bearing on the existence of the alleged contract would greatly and needlessly prolong this opinion. We have given the case thorough consideration, and are of opinion that the lower court reached the proper conclusion. The evidence is not sufficient for the purpose of impressing a trust upon the estate which a court of equity should enforce by requiring a conveyance of the title, nor is it sufficient to warrant a decree for a recovery upon a *quantum meruit basis.*

The decree is affirmed.

Affirmed.

ANNIE DAVIS *v.* COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. CRIMINAL LAW—Burglary—Evidence—Breaking—Entry by Voluntary Act of Owner or Occupier of House.

Error to Corporation Court of city of Newport News.

Reversed.

W. R. Walker and *J. Thomas Newsome,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

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KELLY, P.:

The defendant, Annie Davis, under indictment for burglary was convicted and sentenced to confinement in the penitentiary for a term of five years.

The indictment charged that in the night time she broke and entered the dwelling house of one E. P. Fowlkes, and "feloniously and burglariously" stole and carried away therefrom the sum of $412.50 belonging to one Dolly Wingfield.

The case is before us for review, and the sole assignment of error is that the court refused to set aside the verdict as being contrary to the law and the evidence.

It is insisted that the evidence failed to show that the alleged theft was committed in a house owned by E. P. Fowlkes, and also failed to show that the defendant was the thief. As to this contention we express no opinion, because the judgment will have to be reversed and a few trial awarded upon another ground, namely, that there was no "breaking" within the meaning of the familiar definition of burglary.

The evidence tends to show that, as contended by the Commonwealth, the theft was committed in a house owned by Fowlkes, and in a room therein occupied and controlled by Dolly Wingfield, the owner of the stolen money. The testimony of Fowlkes and Dolly Wingfield conclusively shows that the defendant was and long had been their intimate associate and friend, and that with their consent and encouragement she carried a key to the house, was "just the same as at home there," was "over there day and night, and anything she wanted there she came and got it." She was not in any sense a servant or employee of the owners, nor a care-keeper or custodian of the property. Her relationship was that of a companion and friend, her right to enter the premises up to the time of the alleged theft being as free and unlimited as that of Dolly Wingfield herself. She came and went at will; she ate and slept there whenever she pleased; and, in short,

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as expressed by Fowlkes, she was "treated the same as homefolks."

Breaking, as an element of the crime of burglary, may be either actual or constructive. There is a constructive breaking when an entrance has been obtained by threat of violence, by fraud, or by conspiracy. Min. Syn. Cr. Law, page 92; *Clarke* v. *Commonwealth,* 25 Gratt. 912. The entrance to the premises in the instant case was not obtained by either of these means, and cannot be classed as a constructive breaking.

Actual breaking involves the application of some force, slight though it may be, whereby the entrance is effected. Merely pushing open a door, turning the key, lifting the latch, or resort to other slight physical force is sufficient to constitute this element of the crime. See the authorities cited *supra.* But a breaking, either actual or constructive, to support a conviction of burglary must have resulted in an entrance contrary to the will of the occupier of the house.

The modern authorities have gone quite far, and we believe properly so, in holding that if a servant or a caretaker, or one having a bare charge (not possession) of the premises, although fully authorized to enter for purposes within the scope of the employment or trust, actually enters for the purpose of carrying out a previously formed design to commit a felony, he will be guilty of burglary. *Clarke* v. *Commonwealth,* 25 Gratt. 912, 917; *State* v. *Corcoran* (Wash.), 143 Pac. 453, L. R. A. 1915 D, 1015 and note; 4 R. C. L. page 424, sec. 12; 9 C. J. 1016.

But in the instant case the right of the defendant to enter the premises as freely and unrestrictedly as either Fowlkes or Dolly Wingfield is undisputed, and it follows that she did not "break" and enter the house, and therefore cannot be convicted of the alleged burglary.

The following language of Judge Moncure, who delivered the opinion of the court in *Clarke's Case supra,* may well be applied here:

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"We have seen no case, and think there has been none, in which the entry was by the voluntary act and consent of the owner or occupier of the house, which has been held to be burglary. And were we to affirm the judgment in this case, we would establish a doctrine of constructive burglary which would not only be new, but contrary to the well known definition of that offense. While the legislature might make such a change, we think it would be judicial legislation in us to do so. If the question, upon principle, were more doubtful than it is, we would be inclined *in favorem vitae,* not to apply the doctrine of constructive burglary to this new case. The offence of burglary may be punished with death."

It is only fair and proper to say that the point upon which we are reversing the judgment does not seem to have been raised in the lower court. The point is one, however, which goes to the substance of the Commonwealth's case, and the failure to raise it at an earlier stage does not deprive the accused of the right to take advantage of it here.

Reversed.

CURTIS DAVIS *v.* COMMONWEALTH.

(Richmond, January 19, 1922.)

1. INTOXICATING LIQUORS—Manufacture—Evidence—Verdict.

Error to Circuit Court of city of Williamsburg and county of James City.

Affirmed.

Frank Armistead and *C. A. Branch,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

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PRENTIS, J.:

The accused has been convicted of a violation of the prohibition law and sentenced to pay a fine of $100 and be confined in the county jail for three months. The error assigned is that the court should have sustained the motion to set aside the verdict as contrary to the law and the evidence.

The rule governing this court in such cases has been so frequently stated that it seems a useless repetition to restate it. Inasmuch, however, as reputable attorneys still appear to question it, we will cite Dean's Case, 32 Gratt. (73 Va.) 917, where this is said: "Where the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases the evidence should be plainly insufficient to warrant the finding of the jury. This restriction applies *a fortiori* to an appellate court. For in the appellate court there is superadded to the weight which must be given to the verdict of a jury fairly rendered, that of the opinion of the judge who presided at the trial, which is always entitled to peculiar respect upon the question of a new trial.

"A new trial asked on the ground that the verdict is contrary to the evidence ought to be granted only in a case of plain deviation from right and justice. And this court will set aside a verdict on such a motion only in a case where the jury have plainly decided against the evidence, or without evidence. *Blosser* v. *Harshbarger,* 21 Gratt. 214, and cases there cited." *Cluverius* v. *Commonwealth,* 81 Va. 816.

This rule is now mandatory upon this court under Code 1919, section 6363.

It is hardly necessary to recite all of the evidence presented by this record. The uncontradicted facts which justified the jury in their finding may be thus summarized: The accused was the tenant of a part of an island known as Yarmouth island, owned by Coleman Richardson, and the

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house in which he lived was also occupied by his wife, his grown son, a daughter and a son-in-law. On Friday morning, March 11, 1921, the officers, whose suspicions had been aroused from information previously received, located in a clearing of about a quarter of an acre of land, a large still with its outfit, consisting of mash boxes filled with six or seven thousand gallons of mash, steam vats, steam engines, large quantities of pipe, brass couplings, etc., to the value of about $2,000. The cord-wood recently cut from the clearing had been racked up, and a number of pigs belonging to the accused, running loose, were also found there. The place was remote, there being only one road leading to the island and this passed by the farmyard of the accused. There one fork of this road goes by the yard to Simpson's island, while the other fork passes directly from his yard to the clearing where this still was located, and no one lives between this dwelling and that point about a mile and a half distant. A wagon track recently made leading from the yard to the still and back again was definitely traced and the wagon which was in the use and control of the accused stood in his yard. He had a horse with a deformed foot or ankle which made a track which was especially noticeable, and this track was observed by one of the witnesses. At the residence of the accused, in the barn yard, a half barrel keg which contained about half a pint of corn whiskey was found. A number of holes had been dug in the garden, and in one of them a glass bottle containing a small amount of corn whiskey was also found. The suspicion of the officers that the still was located on the island was aroused by the fact that large touring cars were making frequent trips thereto, and that frequent shipments of sugar and other supplies were also being made.

The accused attempted to prove an alibi, and testified that early Thursday morning he left his home for Newport News, a nearby city, and that he did not return until Friday afternoon. Even if this alibi had been completely proved its probative value would have been slight. The

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only support for it is found in the testimony of one witness, who testified that he saw the accused in Newport News on Friday, the 11th day of March, at four o'clock p. m. at the house of the witness, and that the accused told him that he would return home on the afternoon train. It is of course apparent that he might have been at home within the twenty-four hours preceding the discovery of the still on the morning of Friday, March 11th, and nevertheless have been in Newport News at four o'clock on the same afternoon.

The location and operation of the still, reached from the land side of the island only by this road leading directly to and from the residence of the accused, the recent clearing of the quarter of an acre of land at its terminus at the still, the feeding of his pigs there, the passing and repassing of large automobiles with supplies, could hardly have occurred without the defendant's guilty knowledge and participation. Whether this be true or not, the evidence presents a case, the determination of which is peculiarly within the province of a jury, and their verdict upon the testimony is conclusive here.

Affirmed.

ELLETT v. COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. TAXES—Choses in Action—Trust Fund—Situs.

Error to Hustings Court of city of Richmond.

Affirmed.

PER CURIAM.

R. L. Montague, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

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It has been frequently decided that under the tax laws of this State, where a citizen of this State, resident in the State, has a life estate in choses in action held in trust for him by a non-resident trustee, such choses are taxable in this State, although they are not and never have been within the State, and the trustee is not a resident of the State. *Selden* v. *Brooke*, 104 Va. 832; *Wise* v. *Commonwealth*, 122 Va. 693; *Brooklyn Trust Co.* v. *Booker*, 122 Va. 680. In the instant case, the only objection made to the assessment is that under the provisions of section 492 of the Code, as amended by Acts 1918, p. 169, it should have been listed in the name of the trustee and not in that of the life tenant. The cases cited are also authority for the proposition that the tax, though assessed in the name of the trustee is not against him but against the beneficiary, and the trustee is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury. This is undoubtedly so where, as here, the income of the life tenant from the fund is in excess of the tax imposed.

In *Bridgewater Mfg. Co.* v. *Funkhouser*, 115 Va. 476, quoted with approval in *Wise* v. *Commonwealth, supra*, it is said: "A person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burden by any errors, omissions or irregularities that do not prejudice his rights," and several cases are cited in support of the proposition. In the instant case, it is wholly immaterial to the life tenant whether the tax is assessed to and paid by the trustee or the life tenant. If paid by the trustee, he will deduct it from his receipts and pay only the balance to the life tenant. If the life tenant gets the gross receipts and pays the tax therefrom the result is the same. We are unable to see how the life tenant is or can be hurt by making the assessment in her name. The question of the *situs* of the property for the purpose of taxation was not involved nor considered in either of the cases above cited, nor was any question raised as to the propriety of listing the property

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in the name of the non-resident trustee. The only question involved was the right of the State to impose the tax. But, as said in *Taylor* v. *Commonwealth*, 124 Va. 445, 450, 17 Va. App. 395, section 492 of the Code of 1904, as amended, undertakes to fix the *situs* for taxation of intangible property held by a trustee for the benefit of a person over twenty-one years of age. The *situs* sought to be fixed is, of course, a *situs* in this State. If the trustee is not a resident of the State, then as to the fund held by the trustee there is no trustee for the purpose of the statute, and the property is, under the terms of the statute, to be listed by and taxed to the beneficiary in the county or corporation wherein he resides.

We find no error in the judgment of the hustings court, and it will, therefore, be affirmed.

Affirmed.

ELLIS v. VIRGINIA RWY. & POWER COMPANY.

(Richmond, January 19, 1922.)

1. EVIDENCE—Admissibility—Res Gestae—Spontaneous Declaration —Exception to Hearsay Rule.

Error to Hustings Court, Part Two, of city of Richmond.

Affirmed.

Bethel & Williams, for the plaintiff in error.

A. B. Guigon, E. R. Williams and *T. Justin Moore*, for the defendant in error.

KELLY, P.:

This is an action for personal injuries brought by Mrs. Lillie P. Ellis against the Virginia Railway & Power Company. The jury having found for the company, the court entered judgment accordingly, and Mrs. Ellis assigns error.

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There are three counts in the declaration as amended which may be briefly summarized as follows: First, that the plaintiff while a passenger for hire on one of the defendant's street cars "rang the bell to stop the car at Eighth and Main Streets so as to alight therefrom, and that she proceeded to alight and get off said car when it had stopped at Eighth and Main streets; and that while she was in the act of alighting, and before she could get off of and clear of said car, and without fault on her part, the said defendant, through its servants, agents and employees, negligently carelessly, wilfully, and unlawfully, suddenly and quickly, and without warning to the said plaintiff, started said car, whereby said plaintiff was shoved, thrown and knocked from said car, and struck by said car before she could get out of its way as it swung around the corner at Eighth and Main streets;" second, "that she rang the bell before reaching the corner and when said car reached said corner it was stopped for the purpose of enabling said plaintiff to get out of said car; that while the plaintiff was in the act of getting out of said car after said car had stopped and before she could alight therefrom on the pavement in safety the said motorman and conductor in charge of said car as the agents of said defendant, negligently and carelessly started said car ahead, thereby throwing the said plaintiff to the pavement without any negligence on her part;" third, "that she rang the bell before reaching said corner and when said car reached said corner it was stopped for the purpose of enabling said plaintiff to get out of the car; that after said plaintiff had stepped off of said car and before she had a reasonable time to get out of the way of said car, and after, by the use of ordinary care and caution, her peril could have been seen, and it was apparent that if the car was moved, that then it would strike her, the said motorman and conductor in charge of said car, as the agents of the defendant, negligently and carelessly started said car ahead and the rear of said car caught, struck, pushed, shoved and knocked said plaintiff, without

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negligence on her part, and she was thereby thrown violently over, upon, to and against the ground, curbing and stones."

The plaintiff herself testified that while she was in the act of alighting with one foot on the ground and her hand still holding to the car the motorman started rapidly forward, "jerked her loose," and she was struck by the moving car. If the jury had believed her statement, it would have been their duty to find in her favor and they doubtless would have done so, but there was abundant, not to say overwhelming, evidence to show that the car did not start until after she had alighted, and had walked several steps, amply far, if she had moved away and kept away from the overlap of the car as it turned the curve just ahead, to have made her perfectly safe. The burden was on her to prove either that she was not given time to alight, or that having alighted she was not given time to clear the car and reach a place of safety. The jury was entirely warranted in finding that the evidence was against her upon both of these theories of the case, and the judgment upon the verdict must be affirmed unless there was error in some of the other rulings of the court during the progress of the trial.

The only serious question in the case, as we see it, is presented by plaintiff's bill of exceptions No. 1, which is as follows:

"Q. 'At the time that you next remember anything since the car struck you, from the time that the car struck you, did this man that picked you up make any statement to you?'

"The foregoing question propounded to Lillie P. Ellis, witness in her own behalf upon direct examination by the plaintiff, upon objection by the defendant, was disallowed by the court, and the plaintiff excepted; the answer to the question excepted would have been:

"A. 'The motorman came up and said 'It is not my fault' and the man who picked me up said 'It was your

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fault, you hardly gave me time to get out of the way and I was in front of her.' "

Looking to other parts of the record, it appears that the plaintiff testified that after being knocked down by the car she did not know anything until she was picked up by a man whom she could describe, but whose name she did not know, and that she did not "come to" until "they" had moved her over to the sidewalk. In the meantime the motorman, who did not see the car strike her (because he was on the front and she was struck by the rear of the car), had again stopped the car on an emergency signal from the conductor, had discovered the trouble, and had gone back to offer his assistance. The interval between the accident and her recovery from an unconscious or dazed condition appears to have been very brief. It was long enough, however, for the conductor to see what had happened, to give an emergency signal, and for the motorman to stop the car, alight and hurry back to where the plaintiff was.

The question and answer which the court rejected were designed to place in evidence before the jury the statement of a third party to the motorman as follows: "It was your fault, you hardly gave me time to get out of the way and I was in front of her."

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It is insisted by counsel for the defendant that the alleged statement was a mere expression of opinion, but the question cannot be disposed of on that ground. This point might well be made as to the expression "It was your fault," but the residue of the statement, "you hardly gave me time to get out of the way and I was in front of her," is a statement of fact which the declarant as a witness might properly have been allowed to make.

The real question, therefore, is whether the recital by the plaintiff as a witness of the alleged statement of this third party or bystander was admissible as a part of the *res gestae*. It might be according to eminently respectable authorities, including Professor Wigmore, more tech-

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nically accurate to say that the question is whether the statement was admissible as a "spontaneous declaration" under an exception to the hearsay rule.

The practical rule as to the admissibility of such testimony, deduced and condensed from the decisions of the courts and the text books generally, seems to be that the declaration must have accompanied the main fact or must have followed under its immediate propulsion, must bear no evidence of reflection or deliberation or calculation, and must have been a spontaneous, undesigned and illustrative incident or part of the litigated act. "These" as this court said with respect to a similar question in the case of *Washington-Va. Ry. Co.* v. *Deahl,* 126 Va. 141, 147, "are the tests of admissibility under the *res gestae* rule. The rule itself is incapable of any precise definition. Its application to a particular case depends upon the circumstances of that case, and necessarily rests at last in every instance upon the discretion and judgment of the trial court. Such discretion and judgment, of course, may be the subject of review, but in doubtful cases there ought to be and is a presumption in favor of the action of the court below."

Professor Wigmore, in the course of a very industrious examination and discussion of spontaneous declarations and of the decisions thereon, says: "Since the application of the principle thus depends entirely on the circumstances of each case, it is therefore impossible to regard rulings upon this limitation as having in strictness the force of precedents. To argue from one case to another on this question of 'time to devise or contrive' is to trifle with principle and to cumber the records with unnecessary and unprofitable quibbles. There is a lamentable waste of time by Supreme Courts in here attempting either to create or to respect precedents. Instead of struggling weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leav-

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ing the application of the principle absolutely to the determination of the trial court. Until such a beneficent result is reached, their lucubrations over the details of each case will continue to multiply the tedious reading of the profession." 3 Wig. Ev., sec. 1750, p. 2257.

While we are not prepared to go quite as far as Professor Wigmore goes in reference to the finality which should attach to the action of the trial court upon this question, we have no disposition to recede from the position taken in that regard in the *Deahl Case supra*. It must be conceded that neither in the *Deahl Case* nor in the case at bar was the question of the admissibility of the declaration free from doubt, but in neither case is it manifest that the trial court was wrong, and this situation brought about an affirmance on that point in the *Deahl Case*, and should produce a like result in this one.

There are, however, certain important differences between the character and setting of the declaration which the court admitted in the *Deahl Case* and that which it excluded in the instant case. In the former. it was the statement of the motorman, one of the actors, whose train had just crashed into a truck, and his exclamation was purely spontaneous and uttered clearly under the spur and excitement of the accident, and it was distinctly illustrated of what he himself had done. In the latter, the case at bar, the declaration was that of a third party, not spontaneously uttered, not an incident of the accident itself nor called forth by it, but a statement made subsequently by a third party, and in reply to one made by the motorman.

It is perhaps not material as bearing upon the action of the trial court at the time in excluding the declaration, because the fact about to be alluded to was not known either to the plaintiff or to the court until after the question and answer had been ruled out, but as a matter of fact the party whose alleged statement was sought to be introduced was present at the trial and testified fully. His testimony was in direct and irreconcilable conflict with the testimony

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of the plaintiffff as to the time he had in which to get out of the way of the car. It is true he was not asked whether he made the alleged statement to the motorman, but it is perfectly apparent that he would have, if pressed upon the question, been obliged to say that he could not have truthfully made it. His testimony shows that he himself had practically reached the sidewalk some distance away from the car before the plaintiff was struck. He could not, therefore, have truthfully said to the motorman, "You hardly gave me time to get out of the way." The point here is that the jury passed upon a conflict of testimony between the plaintiff and the declarant, and necessarily, as shown by their verdict, believed the witness and disbelieved the plaintiff. If, therefore, she had been permitted to say that he made the declaration to the motorman, she would have been in no better position. The conflict between her and the witness would have still been the same, and as it is apparent that they believed him and not her, if it was error to exclude the statement, it was clearly harmless in the result.

The remaining assignments of error relate to the instructions. We have given the most careful consideration to these instructions and to the criticisms urged against them in the oral argument and in the briefs of the learned counsel for the plaintiff. There are no new questions involved, and we deem it sufficient to say that the instructions as a whole fairly and fully and clearly submitted the plaintiff's theory to the jury, and that there was no error therein to the prejudice of the plaintiff.

For these reasons the judgment of the trial court must be affirmed.

Affirmed.

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ELMOE *v.* COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. CRIMINAL LAW—Murder—Evidence—Possession of Stolen Goods —Sufficiency to Sustain Conviction.

Error to Hustings Court, Part Two, of city of Richmond. *Affirmed.*

Thos. I. Talley and *Geo. L. Oliver,* for the plaintiff.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

BURKS, J.:

The plaintiff in error, hereinafter called the accused, was convicted of murder of the first degree, and sentenced to be electrocuted. He assigns two errors to rulings of the trial court; First, the granting of an instruction on the motion of the Commonwealth; and, second, the refusal of the trial court to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence. Both assignments are without merit.

The deceased and his brother kept a store at Tobacco, in Brunswick county. About 8:45 o'clock p. m., on August 1, 1921, the deceased, after eating supper at the house of his brother, left the latter's house to go to the store where he usually lodged at night. About 6:30 o'clock on the morning of August 2, 1921, his dead body was found about one hundred yards from the store. "The face of the deceased was smashed in by a blow from some heavy instrument, and the back part of his skull was also crushed by some heavy instrument, which two blows caused instant death, according to the physician who examined deceased's body." The store was found to have been broken open that night, and a number of articles had been taken therefrom, including five razors, several pairs of shoes and a number of men's garters, a number of men's sleeve-holders,

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and several other articles. "When the deceased left his brother's home he had on him a pistol in a leather holster, which leather holster had been made by the deceased's brother. This pistol had been purchased by deceased's brother about nine years ago and the deceased's brother had put inside of each side of the butt certain numbers and certain letters with some sharp instrument. These marks could not have been seen unless the rubber stock was unscrewed. The deceased's brother had also kept the tag that came off this pistol at the time he purchased it, on which he put the same numbers that he put inside of the butt of the pistol. The tag also had the serial number put on at factory. At the trial, upon examination of the butt of the pistol after taking same apart, these numbers corresponded exactly with the numbers that Mr. Elmore's brother had on the tag, which he still had in his possession, and also the serial number. The five razors that were taken from the store each had cost price figures placed thereon by Mr. Elmore's brother, and also had the initials of Mr. Elmore and his brother." The evidence indicated that the murder was committed by two persons who had placed branches and boughs around a tree as if to make a blind, by the side of a path along which the deceased travelled in going from his brother's house to the store, and not far from where the body of the deceased was found. There were foot prints of two persons, one smaller than the other, leading from the store to the place where deceased was killed and also away from the latter point. There were also foot prints at the place of concealment, "showing that some one had stood there on the previous night." The body had been apparently dragged by two men from the path where the deceased was killed, one having hold of one foot and the other having hold of the other foot until the progress of the body had been stopped by a pine tree lodged between his legs.

When the accused was arrested on the night of August 2, 1921, the night after the murder, he had in his possession

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the pistol and holster aforesaid, which were fully identified as those worn by the deceased the night before. He also had in his possession a number of the articles which had been taken from the store. The accused testified that he was in Richmond on Monday night (August 1), and purchased the shoes and garters from a Jew on Broad street, and that he bought the pistol from a negro in Petersburg for the sum of $2.00. He was taken to Richmond and asked to point out the Jew store where he bought the shoes and garters, but was unable to do so. The testimony for the Commonwealth showed clearly that neither of his statements were true, and that the accused was not far from Tobacco on Tuesday, August 2, 1921, from seven o'clock in the morning till noon, and at other points in the neighborhood during that afternoon and till between eight and ten o'clock that night, shortly before his arrest. So that it was impossible for him to have bought the pistol in Petersburg at any time after the murder.

As pointed out, the testimony indicated that the murder had been committed by two persons, and another man charged with the murder was caught on the night of August 2, 1921, and was lynched. The contention of counsel for the defendant is that the possession of the goods taken from the store is no evidence of the murder, as the murder was not committed at the store and it is not claimed that the goods were on the person of the deceased at the time he was murdered, and as to the pistol and holster which were on the deceased at the time he was killed, that the mere possession of the pistol and holster was not sufficient evidence of the killing to warrant the verdict of the jury, and *Kibler* v. *Commonwealth*, 94 Va. 804, is vouched as authority for the contention. It is also suggested that the defendant could easily have procured the pistol from the lynched man without having been in any way implicated in the murder. There might be force in this suggestion if the defendant had made any such claim, but he did not do so. He said that "he bought it from a negro in Petersburg."

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The instruction objected to was as follows: "The court instructs the jury that while the exclusive possession of stolen goods, which were in the possession of the deceased at the time of his death, is, of itself, not even *prima facie* evidence of the murder of the deceased by the party so in possession of such goods, yet, such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account of how he came by the goods, such proof, if they believe from the evidence it has been so proven, will warrant a conviction of murder. In other words, there should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of murder is superadded to that of larceny, but extrinsic facts and circumstances may constitute such additional evidence. But it is for the jury, under all the circumstances of the case, to determine the value of such refusal, or false account, as evidence."

It will be observed that the instruction does not direct a verdict upon the hypothesis stated therein, but simply tells the jury that if they believe that certain facts are established it "will warrant a conviction of murder," and proceeds to warn them that "the bare possession of the stolen property is not sufficient to warrant a conviction," and then concludes by telling the jury that it is for them "under all the circumstances of the case, to determine the value of such a refusal or false account, as evidence." The instruction plainly left it to the jury to determine the weight to be given to all the testimony in the case, and the jury could not have understood otherwise. The language of the instruction might have been more explicit as to to the pistol and holster, but we are of opinion that the jury could not have been mislead, under the testimony given in the cause, by the language used. The instruction states the law substantially in the language of this court in *Graveley's Case,* 86 Va. 396, where it was said:

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"Where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account, of how he came by the goods, such proof will warrant a conviction. In other words, to use the language of the books, there should be some evidence of guilty conduct, besides the bare possession of stolen property, before the presumption of burglary or housebreaking is superadded to that of the larceny, but extrinsic mechanical indications may constitute such additional evidence. 1 Whart. Crim. Law (9th ed.) sec. 813; *Davis* v. *People*, 1 Park. Cr. Cas. 447; *State* v. *Reid*, 20 Iowa 413; *People* v. *Beaver*, 49 Col. 57; *People* v. *Gordon*, 40 Mich. 716; *Stuart* v. *People*, 42 *Id.* 235; *Newbrandt* v. *State*, 53 Wis. 89; *Walker's Case*, 28 Gratt. 969; *Taliferro's Case*, 77 Va. 411."

This holding was subsequently approved by this court in *Tyler's Case*, 120 Va. 868, and *Stallard's Case*, (1921), 23 Va. App. 531. In *Branch's Case*, 100 Va. 837, it is said: "If the recent possession by the accused of articles stolen from the house broken into is proved, and it appears that he could only have gotten the articles by taking them from the house feloniously entered, this would seem to be sufficient to convict him of housebreaking." All three of these cases were cases of burglary. The same principle, it would seem, should apply to a charge of murder, where the deceased and the accused were strangers to each other, the fact of murder clearly established, and the accused on the day after the murder is found in possession of personal property which was known to have been on the person of the deceased at the time of the murder, and the accused gives a false account of how he obtained such possession.

In *Kibler* v. *Commonwealth*, 94 Va. 804, the charge was murder, and the instruction under consideration was as follows: "The court instructs the jury that possession of

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the fruits of crime recently after its commission affords a strong and reasonable ground for the presumption that the party in whose possession they were found was the real offender, unless he can account for such possession in some way consistently with his innocence. And in case of murder this particular fact of presumption commonly forms also a material element of evidence in connection with other facts proved in the case." Of this instruction, Judge Keith, speaking for the court, said: "This instruction is erroneous. It is true that possession of the fruits of crime recently after its commission, where that possession is not satisfactorily explained, affords the presumption that the party in whose possession they are found was the offender; but this is not a presumption of law, but of fact. It is a deduction of fact to be drawn from the circumstances of the case, and standing alone constitutes a *prima facie* case which will warrant a conviction for larceny. A failure to account for the possession, or an unreasonable account of it, or a false account of it, will strengthen the presumption, but it is for the jury, under all the circumstances of the case, to determine its value as evidence. The recency of possession and the reasonableness of the account are elements to be considered by the jury even in a case of larceny. Now, to take this proposition of law peculiarly applicable to larceny and incorporate it into an instruction in a case of homicide, was calculated to mislead the jury, and to prejudice the prisoner. Can it be said that the mere possession of the pocket book of the deceased by the prisoner who was under the same roof with him and constituted one of his family, would, standing alone, though unexplained, create a strong and reasonable presumption that he committed the murder? If the instruction was prejudicial and misleading in that clause which we have above considered, it was not purged of its vice by the addition to it in which the court states that 'in a case of murder this particular fact of presumption commonly forms also a material element of evidence in connection with other facts proved in the

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case.' The weight and value of the fact in question was to be determined by the jury in connection with the other facts proved, and for the court to state that in connection with other facts proved it constituted a material element of evidence was throwing the weight of its judgment as to its force and effect upon the issue presented to the jury into the scales against the prisoner. That the evidence with respect to the pocket book and its contents was admissible, there can be no doubt, and being admissible it was a circumstance to be considered by the jury in connection with all the other facts proved. They may have been of such a nature as to render the possession of the pocket book a material circumstance, or the attending circumstances may have been such as to deprive that particular fact of any significance. It was for the jury to say."

It is manifest that the court was of opinion that the instruction took away from the jury the determination of the value of the testimony as to recent possession. It was well said that "the recency of the possession and the reasonableness of the account are elements to be considered by the jury even in a case of larceny." It was not contended that the doctrine of "recent possession" was not applicable to a murder case, or that conviction of murder might not be founded thereon in connection with other incriminatory evidence. In that case the deceased and the accused were relatives living under the same roof, and it was not shown that any false or unreasonable account was given as to the manner in which the possession was obtained. Here the parties were strangers and a false account was given as to the manner of obtaining possession, and the arrest was made and the goods found in the possession of the accused almost in hot pursuit. It was on the day after the murder. *Wilson* v. *U. S.*, 162 U. S. 613, contains an interesting and instructive discussion of the doctrine of recent possession of goods obtained by murder, and the effect thereof in connection with other inculpatory testimony, but it is too long for insertion. A conviction of murder of the first degree was sustained by

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the unanimous judgment of the court, Chief Justice Fuller delivering the opinion. In that case, the murder was not discovered nor the goods found on the accused until two weeks after the murder. A number of instructions were given by the trial court, among them the following:

(1) "The law says that if a man has been killed, and killed in such a way as to show that it was done murderously, under the law I have given you defining the crime of murder, then you are to look to see whether the party accused of the killing was found in possession of any of the property of the man killed. If so, that is the foundation for a presumption. It is not conclusive in the beginning, but it is a presumption which you are to look at just as you would look at it as reasonable men outside of the jury box. The party so found in possession of such property, recently after the crime, is required to account for it, to show that as far as he was concerned that possession was innocent and was honest. If it is accounted for in that way then it ceases to be the foundation for a presumption. If it is not accounted for in that satisfactory, straight-forward and truthful way that would stamp it as an honest accounting, then it is the foundation for a presumption of guilt against the defendant in this case, just upon the same principle as if a certain man is charged with robbery or larceny, and is found in the possession of the property stolen or robbed recently after the crime, he is called upon to explain that possession. If his explanation of it is truthful; if it is consistent; if it is apparently honest; if it is not contradictory; if it is the same at all times; if it has the *indicia* of truth connected with it, that may cause to pass out of the case the consideration of the presumption arising from the possession of the property, but if it is not explained in that way, it becomes the foundation of a presumption against the party who is thus found in possession of that property."

In discussing the instructions, the Chief Justice said: "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty

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possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. 1 Greenl. Ev. (15th ed.) sec. 34. In *Rickman's Case*, 2 East P. C. 1035, cited, it was held that on an indictment for arson, proof that property was in the house at the time it was burned, and was soon afterwards found in the possession of the prisoner, raises a probable presumption that he was present and concerned in the offense; and in *Rex* v. *Diggles*, (Willis Cir. Ev. *53) that there is a like presumption in the case of murder accompanied by robbery. Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict. *Williams* v. *Commonwealth*, 29 Penn. St. 102; *Commonwealth* v. *McGorty*, 114 Mass. 299; *Sahlinger* v. *People*, 102 Ill. 241; *State* v. *Raymond*, 46 Connecticut, 345; Whart. Cr. Ev., sec. 762.

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"Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense made or procured to be made as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. 1 Greenl., sec. 37; 3 *Id.* sec. 34; *Commonwealth* v. *Webster*, 5 Cush. 295.

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"The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Hicks* v. *United States,* 150 U. S. 442, 452; *Allison* v. *United States,* 160 U. S. 203. The trial judge did not charge the jury to treat the testimony of the defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give to his evidence, under all the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive.

"We cannot reverse this judgment for error in either of the instructions complained of."

Under our practice, instructions expressing the opinion of the court on the weight of the evidence cannot be given by the trial court, as some of the instructions in the Wilson case did, but the instructions in that case indicate what may be considered by the jury in arriving at a verdict in cases of that kind.

There are expressions in some of the cases relating to "recent possession" to the effect that such possession raises a *prima facie* presumption of the guilt of the accused, and that the burden is on the accused to overcome such presumption. It would be more accurate to say that it is a matter of evidence to be considered by the jury along with other evidence, in determining the guilt or innocence of the accused. The burden is on the Commonwealth to establish the guilt of the accused beyond a reasonable doubt, and this burden continues throughout the trial and never shifts. It is not a case of a presumption of guilt which the accused must overcome in order to avoid conviction. It is enough if the accused can raise a reasonable doubt as to his guilt. If upon the whole evidence in the case, including "recent possession" a reasonable doubt remains in the minds of the jurors as to the guilt of the accused, he is entitled to the benefit of that doubt. *State* v. *Lax,* (N. J.) 59 Atl. 18, and cases cited. The jury were fully advised of this doctrine by other instructions given at the instance of the prisoner, two of which were as follows:

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"The court instructs the jury that the accused is presumed to be innocent, and that this presumption follows him throughout every stage of the trial, and that the burden of showing the guilt of the accused to the exclusion of every reasonable doubt is upon the Commonwealth, and this burden never shifts and always rests upon the prosecution, and while the Commonwealth may prove such facts as may raise the presumption of guilt unless they are rebutted by the accused, still, after the evidence is closed, if upon a consideration of the whole there is a reasonable doubt of his guilt the jury should acquit."

"The court instructs the jury that the law presumes the accused to be innocent until he is proved guilty beyond a reasonable doubt if there is upon the minds of the jury any reasonable doubt of the guilt of the accused the law makes it their duty to acquit him, and circumstances of mere suspicion or probability of his guilt, however strong, are not sufficient to warrant a verdict of guilty, but before you can convict the prisoner you must be satisfied from the evidence not only that the circumstances are consistent with the prisoner's guilt, but the jury must be satisfied from the evidence that the facts are such as to be inconsistent with any other rational conclusion than that he is guilty, and that the doubt must not be an arbitrary or unreasonable doubt, or a doubt of immaterial or non-essential circumstances, but must be a reasonable doubt of some fact or facts in the evidence essential for the jury to believe to warrant a verdict of conviction."

The instruction complained of was not in conflict with these instructions, and left it entirely to the jury to consider and determine the weight to be given to all the testimony submitted to them. It is unnecessary for us to say anything as to the right of the accused to remain silent as to how he obtained the goods, as he did not remain silent, but upon the evidence in the case we find no error in said instruction to the prejudice of the accused.

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From what has been said, it is manifest that we cannot say that the verdict is either plainly contrary to the evidence, or is without evidence to support it. The judgment of the trial court will, therefore be affirmed.

Affirmed.

HUBARD & APPLEBY, INC., v. THACKER, ET ALS.

(*Richmond, January 19, 1922.*)

1. MORTGAGES—Right of Mortgagee to Substitute Himself in Place of Mortgagor against Vendee—Assent of Mortgagee.

Appeal from Circuit Court of city of Norfolk.

Reversed.

Jas. G. Martin, for the appellant.

R. B. Spindle, Jr., and *T. D. Savage,* for the appellees.

The material facts in this case are that one Portlock executed a certain deed of trust conveying certain real estate to secure the payment of a debt of $3,000.00 of himself to appellant, evidenced by three notes of the grantor payable to the order of the appellant, one note for $300.00, payable December 3, 1913, another for $300.00 payable December 3, 1914, and the remaining note for $2400.00 payable December 3, 1915; all of such notes bearing interest from date payable semi-annually, with the right of the debtor to anticipate the payment of any or all of such notes. Portlock paid $100.00 on the first mentioned note.

Thereafter, in the latter part of 1913, about the time the first note fell due, the appellee, Thacker, entered into negotiations to purchase the property from Portlock, upon the understanding that if the purchase was made Thacker would assume the payment of the deed of trust debt as a part of the purchase money. While these negotiations were under way and before making the purchase Thacker called upon the appellant to ascertain what at that time was the amount of the deed of trust debt, what part of it was due, the condi-

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tion of the notes, interest due, etc. The secretary and treasurer of the appellant "showed Thacker the notes and * * talked the matter over" with him. Thacker asked for some additional time on the note which fell due December 3, 1913, in case he became the purchaser of the property. Appellant agreed to that, telling Thacker it would "be all right." The secretary and treasurer of appellant testifies that appellant made that agreement of extension of time because they knew Thacker and were "mighty glad for him to take the property * * because (they) thought he was a good deal more responsible than Mr. Portlock, who held it at that time." Thacker does not testify in the case, nor is there any evidence tending to controvert the truth of this statement. The purchase was accordingly closed by Thacker some time in January 1914, by his taking a deed from Portlock and wife dated December 23, 1913 conveying the property to him in which it was stipulated that "the said J. Ernest Thacker expressly assumes the payment of certain notes for three thousand dollars ($3000.00) with interest from the date of these presents secured by deed of trust" etc., (describing the said deed of trust). Thacker did not sign the deed, but accepted it with such stipulation in it and thereafter dealt with the property as his own. The appellant was fully informed of all of this; and in accordance with the agreement aforesaid entered into between Thacker and appellant as to the extension of time of payment of the first note falling due. Thacker, in the spring or early summer of 1914, paid to appellant the $200.00 and accrued interest, balance due on the first $300.00 note, and subsequently the interest which had accrued up to June 3, 1914 on the other two notes. According to the uncontroverted testimony for appellant, the appellant dealt directly with Thacker in giving the aforesaid extension of time and in receiving the payments aforesaid, at his instance and request.

It further appears from the record that the attorneys for Thacker, in examining the title to the property, found a judgment for $1,037.00, with interest from December 22, 1895, of record against a former owner, which would not be

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barred by the statute of limitations until the first rule day in May, 1916. These attorneys thereupon wrote a letter to appellant of date January 15, 1914, calling attention to this judgment of record and saying that they would like to have a letter from appellant "stating that the last note secured in the deed of trust" (aforesaid, which note would fall due December 3, 1915 as aforesaid) "may be extended beyond the life of the judgment." Appellant replied by letter to these attorneys of date January 16, 1914, stating that appellant was "the holder of the notes secured in the deed of trust" aforesaid, designating it, and added: "We hereby agree to extend the time of payment of the principal of the last note secured by said deed, which note will be due December 3, 1915, to May 8, 1916." This dealing was directly with Thacker's attorneys at their instance and request, which was equivalent to such dealing directly with Thacker, and is so regarded in the opinion of the court.

The evidence in the record does not disclose whether Portlock was asked to consent or consented to the extensions of time aforesaid before or when they were made.

Thereafter by deed of bargain and sale, of date August 22, 1914, Thacker and wife conveyed the said property to one Hethorn; the deed containing the express stipulation that Hethorn assumed the payment of the two of said notes then remaining unpaid, aggregating $2700.00, "and interest;" Hethorn not executing, but accepting, the deed. Subsequently, Hethorn, by similar deed, of date Sept. 16, 1914, conveyed the property back to Portlock; the deed containing the express stipulation that Portlock assumed the payment of the last mentioned two notes "aggregating the principal sum of $2,700.00"; Portlock not executing, but accepting, the deed.

On December 3, 1914, the second note for $300.00 and the semi-annual interest thereon and on the $2400.00 note, from June 3, 1914, fell due; no part of which was paid. The appellant took no action in the matter until some time in June, or the early part of July, 1915, when, at appellant's request, and because of such default, the trustee in the deed of trust

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aforesaid, duly advertised the property for sale on July 21, 1915 upon the terms of all cash, as he was authorized to do by the deed of trust.

On the day and at the place of sale the president of the appellant's corporation, before the property was put up at auction, saw a real estate agent, whom such president knew had represented Thacker in the purchase aforesaid of the property from Portlock and usually represented Thacker in his real estate transactions, and told such real estate agent that the property was going to be sold. Up to that time appellant thought that Thacker still owned the property and knew nothing of the subsequent conveyances of the property aforesaid. Appellant had been paid nothing on the debt by any one except Thacker since his purchase and assumption of the debt aforesaid, and appellant had looked upon Thacker as bound to it as principal debtor for the said $2700.00 and interest thereon from the time Thacker purchased the property from Portlock and assumed the payment of the debt as aforesaid, and up to the foreclosure sale under the deed of trust recognized and relied upon Thacker as the principal debtor.

Accordingly, the property was offered for sale at public auction on July 21, 1915, and was sold to appellant as the highest bidder at the price of $1700.00. The trustee filed an account of the sale before the commissioner of accounts showing that after the payment of the expenses of the sale there was left of such purchase money the net balance of $1512.15 which when applied to said $2700.00 with interest from June 3, 1914, to July 21, 1915, left a balance of $1,371.00, principal as of that date, of the said indebtedness remaining unpaid; and this is the amount which the appellant claims in this suit to be entitled to recover of appellee, Thacker.

On December 14, 1915 Portlock was adjudged a bankrupt; the funds derived from his estate amounted only to $131.87, which was used to pay costs; and he received his discharge in bankruptcy May 7, 1917.

The bill in the cause was filed in July 1918; made the said Thacker, Hethorn and Portlock parties defendant; and

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asserted the alleged personal liability of the said appellee, Thacker, to appellant for the deficiency aforesaid, as growing out of the facts and circumstances aforesaid.

The court below gave no effect to the dealings directly between the appellant and Thacker; considered the case as the same as those of *Crowell* v. *St. Barnabas Hospital,* 27 N. J. Eq. 650, and *Osborn* v. *Cabell,* 77 Va. 462, in which it was held that the mortgagee could not recover against a defendant grantee of the mortgaged property who had assumed the payment of the mortgage debt by taking a deed with that stipulation in it, where the defendant's immediate grantor, before suit brought, for valuable consideration and in good faith, had released the defendant from such assumption of payment; and the decree under review held that the appellant was not entitled to recover either against the appellee, Thacker, or Hethorn; that it appearing that Portlock had been adjudged a bankrupt the court would not proceed further against him; and the court dismissed the bill.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

This case is now before this court for the second time. The former appeal is reported as *Thacker* v. *Hubard,* 122 Va. 379. That appeal involved an action at law brought by Hubard and Appleby, Inc., against the same Thacker who is the appellee in the present appeal, based on the same facts which appear in the record now before us, perhaps somewhat more elaborate in detail in the present record. On the former appeal it was held that the action at law, based upon such a cause of action, did not lie. That the remedy of the complainant, if any, was by suit in equity, in accordance with the doctrine of *Crowell* v. *St. Barnabas Hospital,* 27 N. J. Eq. 650, 655-6; *Keller* v. *Ashford,* 133 U. S. 610, 624-5, 10 Sup. Ct. 494, 33 L. Ed. 667; *McIvane* v. *Big Stony L. Co.,* 105 Va. 613, 54 S. E. 473; *Willard* v. *Worsham,* 76 Va. 392; *Osborne* v. *Cabell,* 77 Va. 462; and other kindred cases cited. The rule that the remedy, in such case, is by

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suit in equity alone, prevails in America in only a comparatively few of the jurisdictions; in New Jersey, California, Virginia and in a few of the other jurisdictions, 2 Jones on Mortgages, (7th ed.) sec. 761, 761a, 761b, 761c; and in some of these the rule is statutory.

In accordance with the doctrine of *Crowell* v. *St. Barnabas Hospital* and *Osborne* v. *Cabell,* cited above, the promise of the grantee to pay the mortgage debt is not made for the benefit of the mortgagee, but solely for the benefit of the mortgagor. Hence, as it is held in these cases, no action at law will lie by the mortgagee against the grantee the ground of the refusal of a right of action at law being want of privity of contract. Even "in equity, as at law," as is said in *Thacker* v. *Hubbard,* quoting with approval from *Keller* v. *Ashford, supra,* (33 L. ed. 667), "the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee." And, as is further said in *Thacker* v. *Hubard, supra,* (122 Va. at p. 393): "* * * no agreement between the mortgagor and his grantee that the latter shall assume the mortgage debt, can change the relations of the mortgagor and mortgagee, and require the latter to treat the mortgagor as a mere surety for the debt, without the assent of the mortgagee, (*Shepherd* v. *May,* 115 U. S. 505; 6 Sup. Ct. 119, 29 L. ed. 456), but *when the assent of the mortgagee has been given,* equity, by a *quasi* subrogation, and in order to avoid a multiplicity of suits, gives to the mortgagee the benefit of all the collateral obligations for the payment of the debt which the surety (mortgagor) holds for his indemnity. This right of the mortgagee is not the result of any contract * * *. 'The equity on which this relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor.' " (Italics supplied).

It is just here that the crucial question of law involved in the case before us arises, namely:

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1. At what time, in accordance with the equitable doctrine aforesaid, is the appellant, the mortgagee, permitted to succeed to the right of Portlock, the mortgagor, against his vendee, Thacker, by substituting himself (the mortgagee) in the place of the mortgagor? At the time of suit, or at the time the appellant, at the instance of Thacker, dealt with him as the principal debtor and accepted him as much, thereby assenting to the changed relationship aforesaid of the parties,—of which acceptance and assent Thacker had notice at the time?

This is an open question in Virginia.

This question was not involved and was not decided in *Osborne* v. *Cabell*, (*supra*) (77 Va. 462), or in *Crowell* v. *St. Barnabas Hospital, supra* (27 N. J. Eq. 650), relied on for appellee. In neither of these cases was there any assent of the mortgagee, before the suit was instituted, to the changed relationship of the mortgagor and mortgagee brought about by the agreement between the mortgagor and his grantee by which the latter assumed the mortgage debt and became in equity the principal debtor, as between the mortgagor and grantee. All that is said and held in those cases in reference to the right of action of the mortgagor against the grantee at the time of suit is applicable only to cases in which prior to the time of suit the mortgagee has not assented to the changed relationship just mentioned and in which, prior to such assent as evidenced by the institution of the suit, the mortgagor has, for valuable consideration and in good faith, released the grantee from such relationship. As properly held in these and other like cases, and as must clearly be so upon principle, in such case the assent of the mortgagee to the at-one-time-existing relationship aforesaid comes too late to obtain the benefit of it, because the relationship no longer exists at the time of the assent.

In *Willard* v. *Worsham, supra* (76 Va. 392), the question we have under consideration was considered, but left undecided. There was no action of the mortgagee in that case indicating assent to the changed relationship aforesaid before the suit in equity was instituted by the mortgagee

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against the grantee; but there was, prior to the institution of the suit, a release of the grantee by the mortgagor, which was held to be invalid as a release, because of the insolvency of the mortgagor at the time of the giving of the release and of its being without consideration to support it. However, what is said in the opinion of the court delivered by Judge Staples, touching the question we have under consideration, is pertinent, in view of the position urged in argument for appellee, Thacker, that the doctrine aforesaid prevailing in Virginia fixes the rights and remedies of the mortgagee as those possessed by the mortgagor at the time of the institution of the suit, and that conduct of the mortgagee and the grantee in dealing directly with each other, showing the assent of the former to the changed relationship aforesaid, can not fix the rights of the mortgagee against the grantee prior to suit brought, so that the mortgagor's subsequent *bona fide* release of the grantee supported by a valuable consideration can be held to be inoperative. The position thus taken is that the courts in those jurisdictions which allow an action at law by the mortgagee against the grantee give such effect to such assent of the mortgagee; but that it would be violative of the very principle on which the doctrine aforesaid rests, which has been adopted in Virginia, for the Virginia court to so hold. We do not so view the subject, and we are strengthened in our view by the consideration that in the opinion delivered by Judge Staples in *Willard* v. *Worsham* he perceived no inconsistency which would have arisen from a holding by the Virginia court that the remedy in this class of cases is in equity only and yet holding that the undertaking of the grantee becomes irrevocable under some circumstances before suit brought; such opinion indeed, going even to the length of favorably considering applying in Virginia the extreme rule applied in the later cases in New York, and in other States, where the action at law is held to lie, that "where the conveyance to the grantee is absolute and unconditional, in consideration of which he undertakes to pay the mortgage debt as a part of the purchase money, the

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undertaking is irrevocable and the mortgagee is at once vested with the right to enforce the convenant—a right which cannot be defeated by a rescission of the contract between the mortgagor and the purchaser." And this opinion clearly shows that the court did not consider that there was anything inconsistent in principle in applying in Virginia the rule that the time of assent by the mortgagee, to the changed relationship aforesaid of the parties, whether before, or at the time of and as indicated by suit brought, is the time at which the respective rights and remedies of the parties are irrevocably fixed. After reviewing the authorities on the subject of whether an action at law will lie in such class of cases; referring among others to *Ross* v. *Milne,* 12 Leigh (39 Va.) 204, also cited in *Thacker* v. *Hubard, supra,* (122 Va. at p. 394), in which the holding was that an action at law in such class of cases will not lie; the opinion then proceeds to deal with the jurisdiction in equity and the doctrine aforesaid upon which it rests, and holds that the court had jurisdiction of the case in equity. Thereupon, on the subject of when a release of the grantee by the mortgagor will be binding on the mortgagee, this is said: "I admit that the authorities are very conflicting upon this very perplexing question. In some of the cases it is held that where the grantee, by his conduct, assumes the payment of the mortgage debt for the indemnity of the mortgagor, and not for the better security of the mortgagee, the parties may abandon the contract at any time they see fit, unless it appears that the mortgagee, relying upon the indemnity has placed himself in a position from which he cannot retreat without loss, in case the agreement is not performed. In other cases, it has been held that where the grantee has assumed the payment of the mortgage debt, *and the mortgage creditor has notice of it and assents to it, his right of action cannot be defeated by a release to the grantor.* (Italics supplied).

* * * * * * * * * *

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"It seems to me there is great force in the doctrine held by the New York courts" (above referred to, which is a different and more extreme doctrine than that referred to in the italicized portion of the quotation just made), "because the grantee having assumed the payment of the mortgage debt, and retaining the absolute ownership and possession of the mortgaged estate, he, to that extent, diminishes the resources of the mortgage debtor and his means of payment, and he ought not to be permitted to evade a just responsibility by any acquittance or discharge obtained from the mortgage debtor. Whether he might do so, upon a rescission of the contract out and out and a reconveyance of the estate *before the rights of the creditor have been recognized* or asserted, is another question not before us." (Italics supplied).

And when we examine the decisions in the States other than Virginia in which it is held that the action at law will not lie; that the remedy under consideration is in equity alone; and that the relief must be given in equity upon the application of the equitable doctrine aforesaid; we find nothing in them against, and, in some instances, especially in New Jersey, where the holding that the jurisdiction is in equity alone seems to have originated, much in favor of the view that the equitable rights of the mortgagee under that doctrine become fixed and irrevocable the moment the mortgagee assents to the new relationship aforesaid, or certainly when he both assents to it and the grantee has notice that he does so.

We find the following holdings in New Jersey on this subject: In *Youngs* v. *Trustees*, 31 N. J. Eq. 290, at pp. 299-300, this is said: " * * *Where the mortgagee has acquired no independent equity arising from the dealings between him and the subsequent grantee* of the mortgaged premises, and stands *exclusively* on the engagement of the grantee with his grantor to assume and pay the mortgage debt, he cannot have the benefit of that contract if it has, before bill filed, been released and discharged in good faith by those who were the parties to it." And further on,

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speaking of such a release, it is said that it "will operate as a complete extinguishment, unless, *in the meantime, some equitable right in it has arisen in favor of third persons.*" (Italics supplied).

In *Crowell* v. *St. Barnabas Hospital, supra,* (27 N. J. Eq. at p. 658) this is said: "*There may be circumstances in the dealings of the subsequent purchaser with the mortgagee * * which will give the mortgagee an independent equity to have his mortgage paid by the grantee of the mortgaged premises.* But where, as in this case, no such circumstances appear, and the mortgagee stands *exclusively* on the promise of the grantee to the mortgagor, he is not entitled to relief if the contract has in good faith been released by those who were parties to it." (Italics supplied).

In New Jersey under its later procedure, there must be a separate suit to foreclose a mortgage, which must precede the suit for deficiency; decree for the deficiency cannot be entered in the foreclosure suit; and in *Field* v. *Thistle,* (N. J.), 43 Atl. 1072, at p. 1073, this is said: " * * although the decree for deficiency cannot now be obtained in the foreclosure suit; yet the commencement of a suit for foreclosure, to which the defendants assuming the mortgage are properly made parties as ultimately liable for the deficiency, is, in my judgment, such an acceptance of their obligation and action thereon as the mortgagee is entitled to rely on as fixing his right to enforce the covenant and terminate the right to release by the voluntary act of the parties. * * Bringing an action to foreclose and claim therein for deficiency is such an adoption of the covenant by the mortgagee as terminates the right to release."

In Indiana, where the procedure is statutory, but where the remedy in the class of cases we have under consideration is allowed upon the ground of equitable subrogation aforesaid, it is held that where the mortgagee has notice of the assumption of the debt by a grantee and accepts the grantee as debtor and the grantee has notice of that fact, the obligation of the grantee thereupon becomes irrevocable, so

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that after such acceptance the mortgagor has no longer any right to release the grantee from the obligation to the mortgagee. *Talburt* v. *Berkshire Life Ins. Co.*, 80 Ind. 434; *Berkshire Life Ins. Co.* v. *Hutchings*, 100 Ind. 496; *Carnahan* v. *Tousey*, 93 Ind. 561.

As said in the case last cited, at p. 564: "The acceptance however, is a mental act, consisting simply of the determination of the party to avail himself of the contract made by another for him. It is therefore a logical and metaphysical impossibility that he should institute a suit on the promise without first having accepted it. The purpose or determination to sue necessarily constitutes, if indeed it does not presuppose, an acceptance of the right to sue. The bringing of an action is therefore sufficient and probably conclusive evidence of a previous acceptance, unless more is meant thereby than the formation of the purpose to appropriate the promise. If more is meant, it must be not simply the fact, but notice of the acceptance, which is quite a different thing, and will be considered as we proceed. * * * If the party for whose benefit a contract is made, neglects to give notice of his acceptance of it, he incurs the peril of its abrogation, and, *if without giving such notice*, he brings an action, he may be defeated by the plea and proof of a rescission accomplished before the service of the summons, just as he may be defeated, if he does give such notice, by proof of a rescission before the notice was served. * * The assignee of a non-negotiable promissory note, by failure to give notice of the assignment to the maker, may in like manner lose the right of action acquired by the assignment; but a complaint upon such note by an assignee need not, for that reason, allege the giving of such notice. There seems to be no reason for a different rule in respect to a contract of assumption by one person of the debt of another, which by a *quasi* assignment of liability is accomplished."

And when we consider the decisions in the States which hold that the action in the class of cases we are considering will lie at law—which is the rule generally prevailing—we

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find that the recovery is permitted on either of two grounds. As stated in 2 Jones on Mortgages, (7th ed.), sec. 762, the mortgagee is "allowed to recover in a suit at law against the purchaser who has assumed the debt, upon the ground of equitable subrogation, or that the transaction amounts to a novation." We see, therefore, that the recovery is allowed at law in some of the States in the same circumstances which give rise to the cause of action in equity in those States allowing the remedy in equity alone. Among these decisions, however, there is a decided cleavage in this: Some of them hold that "where the conveyance is absolute to the grantee, his assumption of an existing mortgage creates against him an absolute obligation for its payment, and a release of this obligation cannot be made by the grantor without the assent of the mortgagee. The acceptance on the part of the mortgagee of the benefit of the assumption is a legal presumption, in the absence of proof, of his actual assent." 2 Jones on Mortgages, sec. 764. Whereas others of the decisions allowing the action at law hold that affirmative evidence of an actual acceptance and adoption by the mortgagee of the agreement of the purchaser, by which the mortgagee is considered to have made himself a party to the agreement,—brought himself into privity with it—is necessary to give the right of action and to fix that right irrevocably. See decisions cited in notes to sections 763a, 764 of the learned work last referred to.

Clifford v. *Corrigan,* (N. Y.), 22 N. E. 756, involves a release of the grantee from his liability on the clause in his deed assuming payment of a mortgage debt; the release being executed after the mortgagee knew of the clause in the deed and had assented to it and adopted it as a security for his own benefit; and the question was whether the obligation of the grantee in the deed was revocable thereafter. In the opinion of the court this is said: "My judgment leads me to answer that question in the negative. Of course it is difficult, if not impossible to reason about it without recurring to *Lawrence* v. *Fox,* 20 N. Y. 268," (which, con-

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trary to earlier decisions in that State, held that the action in such case by the mortgagee against the grantee would lie at law), "and ascertaining the principles upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But which ever of them may ultimately prevail, I am convinced that *they all involve*, as a logical consequence, *the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it.* The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and therefore he might sue upon it, although privy neither to the contract nor its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, *it must be that he obtains it when it has come to his knowledge and he has assented to it and acted upon it;* for he may sue. That is decided and is conceded. *If he may sue, he must at that moment have a vested right of action. If he has not obtained it earlier,* it must have vested in him at the moment when his action was commenced; so that the right and the remedy were born at the same time. *But there is no especial magic in a law suit.* If it serves for the first time to originate the right which it seeks to enforce, *it can only be because the act of bringing it shows unequivocably that the promise of the grantee has come to the knowledge of the plaintiff; that the latter has accepted and adopted it; that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act, or omit to act, in reliance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere law suit accomplish?* And so the

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contract between the grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it, and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion." (Italics supplied.)

In *Gibson* v. *Hambleton,* (Neb.) 72 N. W. 1033, this is held: "After notice of such covenant and assent thereto by the mortgagee, his right of action thereon cannot be diverted by a voluntary rescission thereof by the contracting parties."

In Texas, where the action at law is allowed in the class of cases which we are considering, it is held that the obligation of the grantee to the mortgagee does not become irrevocable without the consent of the mortgagee until the mortgagee has in fact assented to or accepted the promise of the grantee. In *Hoeldtke* v. *Horstman,* (Tex.), 128 S. W. 642, there is an able and instructive opinion on the subject. After an exhaustive consideration of the decisions both in the States allowing the action at law and those confining the remedy to a suit in equity the court says: "So far as our investigation has been extended, *all of the cases where this question has been involved concede that the promise of the grantee becomes irrevocable when the mortgagee has in some manner acted upon it,* with the exception of two, one in California and the other in New Jersey. *Biddell* v. *Brizzolara,* 64 Cal. 354, 30 Pac. 609; *Laing's Ex'rs* v. *Byrne,* 34 N. J. Eq. 52. * * * In those cases where it is held if the mortgagee has in some manner acted upon the promise of the grantee that the liability of the latter becomes fixed, *it is not claimed that this action must be such as would create an estoppel against the grantee.* It seems to be sufficient if it is such as to evince *an acceptance* or *an adoption of the promise by the mortgagee.*" (Italics supplied).

In *Biddell* v. *Brizzolara,* 64 Cal. 354 and *Laing's Ex'rs* v. *Byrne,* 34 N. J. Eq. 52, it is true that it is held the right of

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the mortgagee of subrogation is lost by a rescission of the contract of sale before the commencement of suit to foreclose the mortgage, but an examination of these cases discloses that no circumstances appear therein of dealings of the grantee with the mortgagee prior to the commencement of the suit giving the mortgagee any independent equity to have his mortgage debt paid by the grantor. So that these cases stand precisely upon the same footing as *Crowell* v. *St. Baranabas Hospital, Osborne* v. *Cabell* and other like cases above referred to.

It is true also that in 2 Jones on Mortgages, sec. 763, this is said: "Whether the grantor can deprive the mortgagee of the benefit of the covenant made by the grantee who has assumed the payment of the mortgage will in large measure depend upon the ground upon which the mortgagee is allowed to take advantage of such covenant. On the one hand if this covenant be regarded as an agreement of indemnity against the mortgage debt, which the mortgagee may avail himself of by way of equitable subrogation, the grantor and his purchaser may *at any time before the filing a bill to foreclose the mortgage* extinguish the liability, as between themselves * * * ' and as the contract of indemnity is thus put an end to by the act of the parties to it, there is then no right to which the mortgagee can be subrogated." (Italics supplied).

But this, as appears from the authorities cited in the footnote to sustain the text, is but a statement of the general doctrine embodied in the holding in *Crowell* v. *St. Barnabas Hospital* and like cases, and, as we have seen from the consideration of these cases above, such statement of the doctrine must be qualified by the further statement made, as aforesaid, in the *Crowell* v. *St. Barnabas Hospital Case,* which is, in substance, that the filing of the bill fixes the time when the obligation of the grantee becomes irrevocable only in those cases where no circumstances appear in the dealings of the grantee with the mortgagee prior to suit which gives

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the mortgagee an independent equity to have his mortgage paid by the grantee of the mortgaged premises.

As said in 27 Cyc. 1360: "A contract for the assumption of a mortgage, on a sale of the mortgaged premises, may be rescinded or cancelled between the parties to it, so long as the mortgagee has done nothing to show his adoption of the benefit of such contract or his acceptance of the purchaser as the principal debtor; and this may be accomplished either by a formal release or a revocation of the contract, or by a rescission of the contract of sale or reconveyance of the property. But after the mortgagee has accepted or adopted the contract, or acted upon the faith of it, it is not in the power of the parties against his rights, to change or annul it." And numerous cases are cited to sustain the text, from States in which the remedy is in equity only, as well as from States in which the action at law is held to lie.

In the instant case the mortgagee, the appellant, dealt directly with the grantee, Thacker, at the request of Thacker, after knowledge on the part of the appellant of Thacker's promise, and acted upon the faith of and relied upon that promise to the extent of giving Thacker an extension of time for payment of parts of the debt then owing, and these parties subsequently, in the dealings directly with each other in the matters of the payments made by Thacker in accordance with the extension of time given him as aforesaid and the acceptance of such payments by appellant, both acted upon and in accordance with the new promise of Thacker and recognized its existence. Such action we think certainly amounted to an acceptance and adoption by appellant at the time of the benefit of the promise of Thacker to pay the debt as principal debtor, of all of which Thacker then had notice. Here we have present all of the requisites which any of the authorities consider essential to the acquisition of the right of action in such case, in equity or at law,—namely, the mortgagee accepted and adopted the new promise as for his benefit and acted upon it in such a

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manner as to notify the grantee of such acceptance and adoption of such promise. From that moment, certainly in equity, even more than at law, the mortgagee must be assumed to have acted or to have omitted to act in reliance upon it. And certainly it is in entire accord with the principles of equity that the cause of action should be considered as thereupon arising in that forum. Therefore, the remedy in Virginia being in equity, we think, both upon principle and under the authorities above considered, that the circumstances above mentioned, present in the case in judgment, fixed irrevocably, as of the time just mentioned, the equitable right of the appellant to the subrogation which is the basis of the cause of action in equity in such case. Hence the reconveyance of the property thereafter by a grantee of it to the original grantor and mortgagor and the assumption aforesaid at such subsequent time by the latter of the mortgage debt did not operate to release the prior grantee, Thacker, from his obligation aforesaid to appellant.

The case must therefore be reversed, and final decree will be entered in favor of appellant for the deficiency of $1371.00 principal, left unpaid of the mortgage debt after the foreclosure of the deed of trust, with interest thereon from July 21, 1915, and costs.

Reversed and final decree.

HARDING *v.* COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. SEDUCTION—Evidence—Promise of Marriage—Corroboration.
2. IDEM—Evidence—Previous Chaste Character of Prosecutrix.
3. IDEM—Venue—Evidence.

Error to Circuit Court of Fluvanna county.

Affirmed.

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Fife & Pitts, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

KELLY, P.:

Upon an indictment charging that he did "feloniously, under promise of marriage, seduce and have illicit connection with Laura Tillman, an unmarried female of previous chaste character," Pleasant Harding, Jr., was tried, convicted and sentenced to a term of four years in the penitentiary. The case is here for review, and there are three assignments of error, which will be disposed of in their order.

1 }

1. It is claimed that the court erred in refusing to set aside the verdict, "because the promise of marriage was not corroborated." As a ground upon which to ask for a reversal of the judgment of the lower court, this assignment is wholly without merit.

The prosecutrix testified that the prisoner courted and became engaged to her, and that under and by virtue of the promise of marriage he seduced and had illicit intercourse with her. In corroboration of this testimony on her part, it appears, chiefly from the evidence of other witnesses, that the prosecutrix and the prisoner lived in the same neighborhood; that on January 1, 1919, he began, and thereafter for some months continued, to pay her very marked and constant attention, being during that time her only beau, and visiting her about three times each week; that after she became pregnant he admitted to as many as four of the witnesses for the Commonwealth that he had promised to marry her before he had become intimate with her, and that after finding out about her condition he had recommended to her that she resort to some medical means of destroying the unborn child. The prisoner himself admits, in what appears to be a spirit of utter heartlessness,

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that he first secured the consent of the prosecutrix to improper relations with him by his kisses and embraces, and that thereafter he had intercourse with her many times. He also admits offering to aid her in taking steps necessary to produce an abortion. It is true that he denied having made the promise of marriage, and denied having admitted to others that he had made such promise. This, however, merely raises a conflict in the evidence which the verdict of the jury settled conclusively, and adversely to him. There was abundant corroborating testimony, not emanating from her mouth, to support and strengthen the evidence of the prosecutrix as to the seduction and promise of marriage. This meets the requirements of the law. *Hausenfluck's Case,* 85 Va. 702; *Mill's Case,* 93 Va. 815. The admissions of the accused, if believed by the jury to have been made as testified to, constituted sufficient corroboration. ***Hausenfluck's Case, supra; Flick's Case,*** 97 Va. 766; *State* v. *Baldoser,* 88 Ia. 55, 61; *State* v. *Knutson,* 91 Iowa 549, 552; *State* v. *Brinkhaus,* 34 Minn. 285, 286; *State* v. ***Phillips,*** 185 Mo. 185, 188.

2 }

2. The second assignment of error complains of the action of the court in refusing to set aside the verdict of the jury "because the evidence established the fact that the prosecutrix was not a female of previous chaste character." This, like the first assignment, is conclusively cut off by the finding of the jury upon the evidence. The prisoner testified that one John Herndon had admitted a previous intimacy with the prosecutrix, and that the prosecutrix herself had admitted the same thing. But Herndon and the prosecutrix both denied having made any such admission; she testified most positively that she had never been intimate with any man except the prisoner; and there was much affirmative and uncontradicted evidence to show that her previous reputation for chastity was good. Her chastity was presumed (Code 1919, sec. 4410, and Revisors' note and citations); and while, as pointed out above, his testimony made a conflict in the evidence on this point,

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the question thus arising addressed itself to and was settled by the jury. *Mill's Case,* 93 Va. 815, 819. The jury evidently believed her and Herndon, and disbelieved the defendant.

3 }

3. The remaining assignment is that the court erred in refusing to set aside the verdict on the ground that the venue of the crime was not proved.

The indictment was found and the case was tried in Fluvanna county. The evidence shows that both the accused and the prosecutrix resided in that jurisdiction. The accused testified that their acts of intercourse took place in her home, while she fixed the place as being near a road between her home and Antioch church, where they often went together. The evidence of the witnesses, as copied in the record, does not show in terms that the place of intercourse, as fixed by the prosecutrix, was in Fluvanna county, but in the bill of exceptions containing the evidence the trial judge is careful to set out that such evidence "*together with the certificate of the judge at the end of the stenographic report*" is all the evidence introduced; and the certificate referred to is as follows: "It is certified that immediately after the rendition of the verdict, and while the evidence was fresh, a motion was made to set aside the verdict (as appears from the record), and it was urged by the defendant's counsel that there had been a failure to prove the venue of the offense as alleged, but the motion was overruled, the recollection of the court being, as it still is, that the venue of the offense was satisfactorily proved to have been in Fluvanna county."

To support the contention that the venue was proved, counsel representing the Commonwealth filed the affidavits of R. H. Haden, member of the Fluvanna bar present at the trial, and of J. H. Payne and J. C. Shepherd, members of the jury, all three of whom made oath that the place of the offense as fixed by the prosecutrix was shown by affirmative evidence, in answer to a direct question by the attorney for the Commonwealth, to have been in Fluvanna

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county. To the contrary, counsel for the prisoner filed the affidavit of the stenographer, A. C. Williams, to the effect that the transcript of the evidence made by him and embodied in the bill of exceptions, was a true and accurate record. There is a stipulation in the record that these affidavits may be considered by this court, but they are not made a part of any bill of exceptions. The three affidavits first above mentioned are so definite and particular in their averments as to leave small room to doubt that the venue was specifically proved by one or more questions and answers designed especially for that purpose, and inadvertently omitted or overlooked by the stenographer. Whether these affidavits, notwithstanding the agreement of counsel that we may read them, are made a part of the record so as to permit us to consider them, seems doubtful, to say the least of it; but it is not necessary to rest the fate of the assignment now under consideration upon such affidavits. The other facts above recited, affirmatively appearing in the evidence as certified, may be said to raise a strong presumption that the offense was committed in Fluvanna. (*Richardson's Case*, 80 Va. 124.) When to this presumption is added the certificate of the trial judge that according to his recollection "the venue of the offense was satisfactorily proved to have been in Fluvanna county," we ought not to reverse the judgment on the ground that such proof was lacking.

The question of venue was not raised until after the verdict was rendered. The case in our opinion falls easily within the influence of the holding of this court in *West* v. *Commonwealth*, 125 Va. 747, 750, 752, 18 Va. App. 416. In that case we used the following language, with which we may well conclude the discussion of this assignment of error: "It seldom happens that there is any real merit in an exception based upon a failure to prove venue, unless the question has been developed and made the subject of serious inquiry before verdict. Criminals are supposed to be and usually are indicted where they have committed the

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crime. The necessity of proving the locality is known to practically every tyro in the criminal practice. The record in this case shows that the court, counsel, jurors and witnesses must necessarily have been familiar with the location of the Robertson home on Sycamore street. No question was raised or hinted at as to the local jurisdiction of the court, until after the verdict was rendered. A motion was then made for a new trial on the ground that the venue had not been proved, and this motion was promptly overruled by a local judge of known experience and ability.

"The action of the court in overruling the motion, based on the view that the venue had been sufficiently established, comes to us not only with the usual presumption favoring the correctness of the judgment of a trial court, but upon the facts and circumstances appearing in the evidence and detailed above, which of themselves raise a violent presumption that the Robertson house was within the local jurisdiction of the court, and we do not feel warranted in reversing the judgment upon this point."

In conclusion, we wish to add this comment: Cases of this character are not often free from conflicts in the evidence. A man who will seduce a girl under promise of marriage and then desert her is quite capable of testifying falsely and endeavoring to procure false testimony from others. On the other hand, an unchaste woman who finds herself pregnant and attempts to lessen her shame by claiming that some man has seduced her under promise of marriage, will generally swear falsely and seek to find corroboration of the falsehood in the testimony of others. In either case, the credibility of the witnesses must be determined by the jury, and the courts, even if entertaining a different view, cannot in this particular interfere with the verdict. In the instant case, however, it does not seem amiss to say that the conflicts in the evidence are of minor consequence, and the verdict of the jury upon the real merits of the controversy is supported by a clear preponderance of proof.

The judgment is affirmed.

Affirmed.

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JARRELL *v.* COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. CRIMINAL LAW.—Murder—Indictment—Form—Degree.
2. IDEM—Bill of Particulars—Sufficiency of Indictment—Principal and Accessory—Charge of Two Offenses in One Count.
3. IDEM—Drawing of Venirmen—Persons Present.
4. IDEM—Evidence—Motive for Crime.
5. IDEM—Evidence—Declaration of Accused—Premeditation—Effect of Verdict—Second Degree.
6. IDEM—Witnesses—Exclusion from Court Room—Hearing Testimony.
7. IDEM—Evidence—Declarations.
8. IDEM—Instructions —Degree of Murder—Wound with Deadly Instrument—Justifiable Homicide—Motive.
9. IDEM—Instructions—Flight to Avoid Arrest—Evidence—Untrue Testimony—Discretion of Court.
10. IDEM—Instructions—Evidence—Reasonable Doubt.

Error to Circuit Court of Madison county.

Affirmed.

Will A Cook, for the plaintiff in error.

Attorney General John R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the defendant in error.

There was a trial by jury and the accused, the plaintiff in error in this case, was found guilty of murder in the second degree, as charged in the first count of the indictment, the verdict fixing his punishment at fifteen years in the penitentiary. The judgment under review was entered accordingly.

The indictment in its charge of the murder was in the common law form for murder, not expressly charging murder in the first degree. The first count of the indictment, under which the accused was tried and convicted, as aforesaid, jointly indicts the accused and two others, Lester Lamb and J. N. Kirtley, with the crime aforesaid, charging the crime as having been committed by them jointly as

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principals in the first degree, by making an assault, in which they threw a certain rock, "in their hands then and there had and held, in, against and upon the forehead" of the deceased, one J. A. McDaniel, giving the latter the mortal wound of which, in a few hours thereafter, he died. There was one other count in the indictment jointly indicting the same three parties with the same offense; and two other counts indicting the accused with the same offense, charged as having been committed in practically the same manner by the accused alone; but on motion of the accused the Commonwealth was required to elect on which count it would prosecute and elected to prosecute and did prosecute the accused under the first count aforesaid.

The material facts as the jury were warranted in finding them, and certain testimony which the trial court allowed to go to the jury over the objection of the accused, needful to be here mentioned, may be stated as follows:

The homicide occurred about midnight Christmas eve, December 24, 1920. On that night, which was a moonlight night, the deceased along with one C. B. Jarrell and a number of the neighbors, playing the violin and having a "Christmas eve time," came with C. B. Jarrell to his home arriving about 9 or 10 o'clock, to give a serenade there; and some of the party expected to go on with the serenade at other homes in the vicinity, although C. B. Jarrell did not intend to go any further than to his own home. They found there the accused, a nephew of C. B. Jarrell, J. N. Kirtley, a family connection of his, and Lester Lamb, who lived at C. B. Jarrell's as his home when not away at work, and also other members of the family of C. B. Jarrell and several others. There was music for awhile, and dancing, after which several of the young men, some five or more, set out to go to the home of a neighbor. As these young men were going up a hill near C. B. Jarrell's residence, they were shooting fire crackers and became quite boisterous. On hearing this the deceased and C. B. Jarrell walked up on

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the hill where the young men were. Soon after getting there the deceased and C. B. Jarrell got into a fight, which resulted in the deceased hitting Jarrell on the head with a rock, giving him quite a severe wound which bled profusely. Thereupon, Jarrell returned to his house, coming to his front gate, as his wife testifies, "with his coat * * * all bloody; talked as if he did not know what he was talking about * * * feeling his way along, we went to meet him, he was blind." At this time J. P. Thomas came up and said that the deceased had hit Jarrell.

The accused, Kirtley and Lamb, were not among those present when the fight occurred between the deceased and C. B. Jarrell, but the accused and the two jointly indicted with him were at the house when C. B. Jarrell arrived after being wounded, as aforesaid; and either saw or were informed of his wounded condition. Whereupon, they severally set out for the hill, and before arriving there all three of them were told that the deceased was the man who wounded Jarrell. Thereupon, on their arrival on the hill, they got together, and together approached and attacked the deceased, in retaliation, as the jury were warranted in inferring, for his having wounded Jarrell, as aforesaid. Others took part in the affray, and there was for a time a promiscuous fight with rocks and wrestling, in the midst of which the accused threw the rock at deceased which struck him on the head, causing the mortal wound alleged in the indictment, and then jumped on the deceased, and was pulled off by one of the participants in the affray.

The testimony which the trial court allowed to go to the jury over the objection of the accused was the following: J. P. Thomas, a witness for the Commonwealth, testified that as witness came down from the hill following C. B. Jarrell, after the latter had been wounded, as aforesaid, witness met Lamb, Kirtley and the accused, in the order named, going up on the hill. That Lamb asked witness: "Who hit uncle Charlie?" meaning C. B. Jarrell. That

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witness replied that he thought the deceased hit him. Whereupon Lamb said: "I will knock him in the head"; that Lamb passed witness and called back for the accused. That the accused said: "What do you want?" That Lamb said: "Come up here right quick." That witness next met Kirtley, who asked: "Who hit C. B. Jarrell?" That witness replied that the deceased hit him he thought. That Kirtley said: "That is all right; I will kill the damn rascal that did it." That witness next met Jesse Jarrell, who said nothing; and then met the deceased, who said nothing. That the accused was not present when Lamb and Kirtley made the statements aforesaid. On cross-examination, J. P. Thomas testified that Harry Jarrell, at some time not fixed by the witness, when the accused was not present, said "This is a hell of a bad thing for nothing."

In testifying concerning the wounding of C. B. Jarrell by the deceased one of the witnesses stated that the deceased said, after the fight with C. B. Jarrell, "If I run now, will always have to run." The accused objected to the admission of this in evidence, but the court overruled the objection.

Other pertinent matters are referred to in the opinion of the court.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions raised by the assignments of error will be disposed of in their order as stated below.

1 }

1. The first assignment of error is that the court erred in refusing to quash the indictment because it was in the common law form of an indictment for murder and did not expressly charge murder in the first degree.

We find no merit in this assignment of error.

Although a number of courts of other jurisdictions are not in accord with the Virginia court on this subject, and so eminent an authority as Mr. Bishop (2 Bish. New Cr.

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Prac.—4th ed.—secs 566-587), takes a view contrary to the holding in Virginia with respect thereto, the rule has been for so long and so firmly established in this jurisdiction that an indictment for murder in the common law form is good as an indictment for murder in the first degree, that we are unwilling to change that rule. *Miller's Case*, 1 Va. Cas. 310; *Wick's Case*, 2 Va. Cas. 387; *Livingston's Case*, 55 Va. (14 Gratt.) 595; *Cluverius' Case*, 81 Va. 787; *Kibler's Case*, 94 Va. 804; *Thurman's Case*, 107 Va. 912. Moreover, the accused in the case at bar was not convicted of murder in the first degree, but only of murder in the second degree. Under the ruling of all the courts the indictment was good as an indictment for murder in the second degree. Hence, according to all of the authorities, the indictment is sufficient to sustain the verdict and judgment under review.

2 }

2. The second assignment of error is that the court erred in not requiring the Commonwealth to file a bill of particulars, because "the wording of the first count of the indictment, under which he (the accused) was tried, made it proper that a bill of particulars should have been filed, so as to put him in a fair position to defend himself?

We find no merit in this assignment.

It is true that in *Pine* v. *Commonwealth*. 121 Va. 812, 836-8, 14 Va. App. 575, it is held that the accused has the right to have the Commonwealth file a bill of particulars in certain cases, but this right does not arise in all criminal cases. As there held, it arises only in those cases in which such a bill is necessary to "supply the fault of generality or uncertainty" in the averments of the indictment drawn in question, in stating the cause and nature of the accusation. In the case at bar there is no fault of generality or uncertainty of this character in the averments in the first count of the indictment, which alone is drawn in question by the assignment of error under consideration. This count expressly and distinctly charges the accused with a

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single act, namely, the throwing of the rock which gave the mortal wound, as a principal in the first degree, and it joins as defendants, in the same count, two others as participants in the alleged crime, who are also charged with the same act as principals in the first degree. The accused was tried upon this count and convicted.

It is urged in argument for the accused, to sustain the assignment of error under consideration, that the accused is charged in the first count jointly with others with doing an act, (the throwing of the rock), which it was physically possible only for one of them to have done, hence this count in fact charges the accused with two offenses, that of committing the crime as principal in the first degree, and that of committing it as an accessory, by aiding and abetting its commission. It is true that these two offenses are charged. But that is permissible in such a case, and it has been too long and too well settled that this creates no uncertainty in the averment with respect to what two offenses are thus charged to now admit of question.

As said in 1 Bish. Cr. Law (4th ed.), sec. 467: "If the prosecuting power chooses, it may join as defendants in one count all the participants in a crime. As to which, the test is said to be to consider, 'whether each offender be guilty in some degree of the same crime, so that he might be separately convicted even though another was the actual perpetrator. If each may be so convicted their guilt is joint; * * *'"

In *Idem*, sec. 468, this is said: "Principals of the first and second degree may be joined; as * * * in malicious shooting * * * there may be several defendants, and 'all jointly charged with the single act,' though * * * it was by one of them alone."

In 2 Bish. New Cr. Prac. (4th ed.) sec. 3, this is said: "Where A and B are present and A commits an offense in which B aids and assists him, the indictment may * * * charge them both as principals in the first degree; for the act of the one is the act of the other. And upon such an

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indictment, B, who was present aiding and abetting, may be convicted, though A is acquitted. So A and B, if present aiding and abetting, may be convicted, though C, a person not named in the indictment, committed the act. Again, if an indictment for murder charge that A gave the mortal stroke, and that B. was present aiding and abetting, both A and B may be convicted, though it turn out that B struck the blow and that A was present aiding and abetting. To go one step further, upon a similar indictment, charging A as principal in the first degree, and B as present aiding and abetting, B may be convicted though A be acquitted."

In *idem*, sec. 6a, this is said: "* * * the avernient was adjudged sufficient that three defendants did, with a stick of wood, which each severally had and held in their several right hands, inflicts a mortal wound; * * *"

3 }

3. The third assignment of error is that the court refused to quash the venire on the ground that the names of the veniremen were drawn in the presence of two citizens called upon by the clerk, without it appearing from the record that the presence of the commissioner in chancery could not be obtained, as it required by statute to be the case before the drawing can lawfully take place before the two citizens. It is contended that the statute is mandatory in this particular, and that not only is a venire rendered invalid by such an irregularity, but that the failure of the record to show affirmatively that no such irregularity occurred destroys the validity of the venire, however in conformity with the statute the drawing may have been in fact.

In view of the express provisions of the statute which were not formerly embraced therein, and the further considerations, now to be mentioned, we find no merit in this assignment of error.

The provision of the statute here alluded to, (Acts 1920, p. 25, *et seq.*), so far as material, is as follows: "No irregu-

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larity * * * in the drawing * * * of jurors * * * shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless * * * it appears that such irregularity * * * was * * * such as to probably cause injustice to the Commonwealth or to the accused * * *"

There is no evidence in the record tending to show that the irregularity in question probably caused any injustice to the Commonwealth or to the accused.

4 }

4. The fourth assignment of error is that the court erred in admitting, over the objection of the accused, evidence of the difficulty between C. B. Jarrell and the deceased and all evidence leading up to and connected with such difficulty, on the ground that the accused was in no way connected therewith by the evidence in the case.

Whether this assignment of error is well taken depends entirely upon whether the ground upon which it is based can be sustained. That, of course, is a question of fact. That question of fact was submitted to the jury by the instruction of the court. One of the principal issues in the case was whether or not the accused committed the homicide in retaliation for the conduct of the deceased in the difficulty between him and C. B. Jarrell. There was ample evidence to sustain the jury in finding that this was the motive for the crime. In this way the accused was connected with such difficulty. Hence we find no error in the action of the court in the particular in question.

5 }

5. The fifth assignment of error is that the court erred in admitting in evidence the testimony of a witness that he heard Kirtley, on the evening after the homicide, not in the presence of accused, say that if the accused "had not killed McDaniel, he would."

This being the declaration of a co-conspirator after the object of the conspiracy had been accomplished, it was error to admit it in evidence against the accused, according to the general rule on the subject. 1 Bish. New Cr. Law, (4th

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ed.), sec. 1248 (2); *Burford* v. *Commonwealth*, decided today. But the bearing of this testimony against the accused was that it tended to show that he was guilty of murder in the first degree, in that he acted in concert with Kirtley in execution of the premeditated and specific purpose to kill the deceased. And there was other testimony for the Commonwealth, which is above referred to, that Kirtley made a declaration before the homicide of this purpose on his part, whch was unquestionably admissible in evidence under the rule aforesaid, namely, the declaration of Kirtley to which Thomas testified. The verdict of the jury, however, finding the accused guilty only of murder in the second degree, indicates that they were not influenced in reaching the verdict against the accused by any of the testimony concerning the purpose of Kirtley to kill the deceased; but based the verdict on other testimony in the case, of which the quantity was ample to sustain the verdict, which tended indeed to show that the accused made the assault upon the deceased in concert with Kirtley and Lamb in retaliaton for the assault of the deceased on C. B. Jarrell, but with the intent merely to do the deceased serious bodily harm. Therefore it does not appear probable from the record before us that the accused was prejudiced by the admission of the declaration in question. On the contrary it seems plain that the accused was not prejudiced thereby. Hence we consider the admission of such declaration in evidence as harmless error.

6 }

6. The sixth assignment of error is that the court erred in allowing Harry Jarrell, a witness for the Commonwealth, to testify in the case, he having listened through a window "to the evidence" after he, along with other expected witnesses, had been excluded from the court room.

It is stated in the brief for the accused that the witness in question was put on the stand as a witness in rebuttal. "which fact distinguishes this case from the cases decided by our courts." No cases are cited in the brief, nor were

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any cited in oral argument for the accused on the question under consideration. The leading case in Virginia on the subject is *Hey's Case,* 32 Gratt. (73 Va.) 946, in which the opnion of the court was delivered by Judge E. C. Burks. It is therein laid down that a witness remaining in court in violation of an order of separation may, nevertheless, be examined, his conduct bearing only upon his credibility and subjecting him to being punished for contempt. It is therein held in accordance with what seems to have always been the rule in this country, and the modern rule in England, that the tral judge has no right to exclude such a witness from testifying. No distinction seems to have been made by the authorities between witnesses in rebuttal and other witnesses; and no reason is specified in argument, and we perceive none, why the rule should not be, at the least, as liberal as applied to rebuttal as to other witnesses. In practice, indeed, it is not usually known what witnesses will be used in rebuttal. They are usually some of those who have testified in chief, who are customarily allowed to remain in the court room after giving their testimony and are allowed to hear the remaining testimony for the side of the case on which they testify and also the testimony for the other side, without objection.

7 }

7. The seventh assignment of error is that the court erred in allowing the Commonwealth to introduce in evidence the declarations of Kirtley, Lamb and Harry Jarrell, testified to by J. P. Thomas; and erred also in admitting in evidence the statement of the deceased, "if I run now, will always have to run."

We find no merit in this assignment.

The testimony of J. P. Thomas concerning the declaration of Harry Jarrell, was elicited by the cross-examination in behalf of the accused. The declarations of Kirtley and Lamb were admissible under the general rule referred to above in what is said in connection with the fifth assignment of error. And as to the statement of the deceased, it

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related to his remaining on the hill after he had wounded C. B. Jarrell, and not to his fight with the accused, so that it was either immaterial or had such a remote bearing on the homicide involved in the case in judgment that we cannot regard the admitting of such statement in evidence as having had any material bearing on the conclusions of the jury to the prejudice of the accused, so as to constitute reversible error.

8. The eighth assignment of error covers the same subjects as the 4th and 7th assignments, above dealt with.

8 }

9. The ninth assignment of error is that the court erred in giving the instructions it gave at the request of the Commonwealth, fourteen in number, and occupying three pages of the record. None of the alleged errors in these instructions is pointed out in the petition for the writ of error. The brief for the accused points out certain alleged errors in these instructions, which will be now dealt with.

(a) There are alleged errors pointed out in the 3rd, 4th and 5th instructions, in that, it is urged, they do not correctly instruct the jury on the subject of murder in the first degree. We deem it sufficient to say of these instructions that they are in the usual form which has been approved by the decisions and correctly propound the law applicable to the theory of the Commonwealth as applied to the testimony in the case. But if there had been error in these instructions with respect to the subject of murder in the first degree, as the jury found the accused guilty only of murder in the second degree, and thereby acquitted him of murder in the first degree, such error would have been harmless, unless there were some special circumstances indicating that the jury were influenced in their verdict by the errors with respect to the defining of murder in the first degree. No such circumstance appears from the record before us. It would, therefore, serve no useful purpose for us to here set out in detail the points of error urged upon us touching these instructions.

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(b). The sixth instruction is as follows:

"That the rule of law is that a man shall be taken to intend that which he does or that which is the necessary consequences of his act."

The objection to this instruction is that it is purely an abstract proposition and is misleading. The instruction was directly applicable to the theory of the Commonwealth with respect to the testimony concerning the conduct of the accused in striking the fatal blow with the rock. Hence we find no merit in this objection.

(c). The seventh instruction was as follows:

"That a mortal wound given with a deadly instrument in the previous possession of the slayer, without any or upon very slight provocation, is *prima facie* murder, and throws upon the accused the necessity of proving extenuating circumstances."

There are two objections to this instruction.

The first objection is that it is based upon the theory that the assault was without any or upon very slight provocation and that there is no evidence in the case to support this theory. This position as to the evidence is not well taken. There was ample evidence to support the theory mentioned, if the jury believed the testimony for the Commonwealth which tended to show that the attitude of the deceased at the time of and immediately preceding the homicde was not seriously, if at all, threatening to the accused, and was not in truth the real provocation for the killing; but that retaliation for the wounding of C. B. Jarrell was the real motive for the killing.

The second objection under consideration is that the instruction assumes that the weapon used was a deadly weapon. It is true that whether a weapon is a deadly weapon may under some circumstances become a question of law and fact to be determined by the jury under proper instructions. 13 R. C. L., sec. 48, p. 744. But in the case in judgment no issue was raised by the accused on this subject in the

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trial court; one of the instructions asked for by the accused contained the assumption that the weapon used was a deadly weapon; and the trial having proceeded with that assumption on both sides, as an uncontroverted fact, it is too late to raise that issue on appeal.

(d) The eighth, ninth, tenth, eleventh and twelfth instructions are objected to as containing merely abstract propositions of law. We do not think that this objection is well taken. These instructions are upon the subject of justifiable homicide, were directly applicable to the case in view of the claim of the accused that the killing was in self-defense, and were in the usual form approved by the decisions.

(e) The thirteenth instruction submits to the jury the question of fact whether the motive for the homicide was the striking by the deceased of the uncle of the accused with a rock, in the aforesaid previous fight. The objection to this instruction is that there was no evidence that the accused, before he went to the scene of the crime, knew that his uncle had been assaulted by the deceased.

As appears from the statement preceding this opinion, there was ample evidence from which the jury were warranted in inferring that the accused had the knowledge in question before the homicide.

9 }

10. The tenth assignment of error is that the court erred in refusing to give certain instructions at the request of the accused.

The court gave fourteen instructions at the request of the Commonwealth, a number of which were applicable also to the theories of the defense. The court also gave five instructions asked for by the accused. All of the instructions asked for by the accused and refused, except two, may be disposed of by saying that they were already covered by the instructions given, so that there was no error in their refusal. The jury had been fully instructed.

The two instructions asked for and refused, as just stated which we except from the general statement just made, will now be considered.

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One of these two instructions is as follows: "The court instructs the jury that flight, to avoid arrest, may be considered a circumstance going to show guilt; but the jury is further instructed, that if they believe from the evidence that the accused left the county and joined the army pursuant to a purpose formed before the killing of deceased, and because accused believed he was in danger of death or great bodily harm at the hands of the relatives and friends of deceased, then they cannot consider such flight as evidence against them."

The Commonwealth introduced no evidence tending to show that the accused fled to avoid arrest. The testimony for the Commonwealth concerning the arrest of the accused showed merely that he had enlisted as a soldier and was at Camp Lee when he was arrested; and that his being there was ascertained by the sheriff through a letter of the accused to his father, stating that he wanted to come and stand his trial. This letter was read to the jury by the sheriff, a witness for the Commonwealth. The accused testified to the same effect, and that he left the county and joined the army pursuant to a purpose formed before the homicide and because accused was told that a brother of the deceased was likely to kill him. There was no testimony introduced by the Commonwealth in rebuttal on this subject. No instruction was given for or offered by the Commonwealth about it; and from the record before us it seems plain that there was no issue made in the trial court touching this matter. It seems to us, therefore, that the refusal of this instruction, if error, was harmless error, for which the case will not be reversed.

The other of the two refused instructions under consideration is as follows: "the court instructs the jury that if they believe that Harry Jarrell and J. P. Thomas, or either of them, have knowingly testified untruthfully on any material matter in this case, they are at liberty to disregard the whole of their testimony."

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It has been held that such an instruction should be given (*State* v. *Perry* (W. Va.), 24 S. E. 634); but it is also held that whether it should be given or not, in a particular case, rests largely in the discretion of the trial judge, and, in the absence of a statute authorizing it, should never be given, unless the trial judge suspects that wilful false swearing has been done in the case. 14 R. C. L., sec. 11, pp. 736-7, citing *State* v. *Hickman*, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54, and *Schmidt* v. *St. Louis R. Co.*, 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380. As said in *State* v. *Hickman*, such an instruction "should not be given as a matter of course * * * and the propriety of giving it in any particular case must be left largely to the judgment and discretion of the trial court." As said in *Schmidt* v. *St. Louis R. Co.*, *supra*, in regard to such an instruction, "The furthest the court can go in that direction without trenching on the province of the jury is to instruct them in effect that if they believe from the evidence that any witness has wilfully sworn falsely as to any material fact in the case, they may, if they see fit, for that reason disregard the whole of that witness' testimony. But in the giving of that instruction the court should act with caution. It is not to be given in every case and should never be given unless the trial judge strongly suspects that wilful false swearing has been done in the case."

Our own views upon the subject under consideration are as follows: The credibility of witnesses is so peculiarly and exclusively within the province of the jury that we think it would be improper for the court to give such an instruction as that under consideration, which was refused in the case before us, because of its singling out by name certain witnesses. We think that naming of any particular witness or witnesses in such an instruction would tend to lodge upon the minds of the jury the impression that the trial judge is not satisfied as to the truth of the testimony of the witness or witnesses mentioned; which would certainly be an improper invasion of the province

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of the jury. If indeed it is an admitted or uncontroverted fact, or there is clear and convincing evidence in the case that a witness or witnesses therein has or have wilfully, or, which is the same thing, knowingly, testified untruthfully on any material matter, such an instruction as that under consideration may, in the discretion of the trial court, be properly given, if couched in general terms, to the effect that if the jury believe from the evidence that any witness or witnesses in the case have so testified, they are at liberty to disregard the whole of their testimony. But the trial judge should, as to such an instruction, in every case, act with caution; he should never give such an instruction unless from all the evidence he believes that wilful false swearing has been done; and even then he should refuse to give such an instruction if he feels that the jury would be warranted by the evidence in coming to a different conclusion as to such testimony.

These being our views, it follows that there was no error in the refusal of the instruction in question.

10 }

11. The eleventh assignment of error is that the court modified instruction No. 7, given at the request of the accused, by inserting the word "equally" before the word "susceptible."

This instruction, as given, is as follows: "The court instructs the jury that every fact necessary to constitute the offense charged must be proven beyond a reasonable doubt, and that if there is a reasonable doubt as to any such fact, they shall acquit: that the result of the evidence must be to exclude every reasonable hypothesis of innocence, and be consistent only with the guilt of the accused; that the jury is not at liberty to guess, and where a fact is equally susceptible of two interpretations, one of which is consistent with the innocence of the accused, they cannot arbitrarily adopt that interpretation which incriminates him."

Accurately speaking, the modification was error. The use of the word "equally" in such a connection would be proper

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in a civil, but is not in a criminal case. But this distinction is not one which is likely to have occurred to the jury. It in no way appears that the verdict of the jury was influenced in the slightest degree by the modification of the instruction. We must, therefore, regard the error as harmless.

12. The twelfth assignment of error is that the court erred in overruling the motion of the accused to set aside the verdict and grant him a new trial because the verdict is contrary to the law and the evidence.

What has been said above renders it unnecessary for us to enter upon any further detailed consideration of the evidence than that which concerns the question of fact whether the accused threw the rock which killed the deceased. It is urgently contended for the accused that the testimony of all of the eyewitnesses of the occurrence leaves it undetermined who threw the fatal rock. This is true in so far as direct testimony to the act of throwing the rock is concerned. But there is testimony showing the circumstances of the positions and attitude of the various persons engaged in the affray immediately preceding and at the time of the homicide, which tends strongly to show that the accused struck the fatal blow with the rock. And there is the testimony of two witnesses for the Commonwealth that the accused admitted that he did so. Some of the latter testimony couples this admission, it is true, with the claim on the part of the accused that he did this in self-defense. But the jury were at liberty, if they felt the evidence warranted it, to accept the truth of a portion of such admission and discard the rest; and that the evidence did warrant this, we have no doubt. J. P. Thomas testified: "Herman (the accused) said, 'I did it, had to do it to save myself, he (the deceased) was advancing on me with rocks.'" The testimony for the Commonwealth was to the effect that the deceased was not advancing on the accused with rocks, or at all, as claimed by the accused, and that the accused did

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not have to strike the deceased with the rock in self-defense. Harry Jarrell testified: "Herman said he had done it;" and "the next night Herman Jarrell said to me, 'we had better get together and get our tales straight'."

We deem it sufficient, therefore, to say, in conclusion of the consideration of the assignment of error last mentioned, that while the evidence is extremely conflicting on the subject of the motive of the killing, and there is evidence in the record which would have warranted the jury in finding the accused not guilty had they given credit to it, at the same time there is evidence which warranted the jury in finding the verdict of guilty, which they did. That verdict is conclusive upon the facts in issue. We find no material error in the instructions or in the action of the court in refusing instructions. The verdict is not in conflict with the instructions given. It is, therefore, not within the province of his court to set aside the verdict.

13. The thirteenth and last assignment of error is that the court erred in overruling the application of the accused for bail.

In view of the conclusions reached above, the case will have to be affirmed, so that the accused will not hereafter have any right of bail. Hence, as the case stands, the assignment of error just stated presents a purely moot question, which, therefore, we will not undertake to decide.

The case will be affirmed.

BURKS, J., *dissenting*:

I am unable to concur in so much of the foregoing opinion as holds that it was harmless error to permit the witness to testify as to what he heard Kirtley say after the homicide, and whch is discussed under the head of the fifth assignment of error. I also think that it was error to refuse the instruction on the subject of flight, and that the refusal was not harmless.

Affirmed.

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LOWRY v. COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. INTOXICATING LIQUORS.—General Verdict on Omnibus Indictment —Jurisdiction—Effect of Volstead Act—Cruel and Unusual Punishment.

Error to Circuit Court of Norfolk county.

Affirmed.

Daniel Coleman, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

The indictment in this case is for violation of the prohibition law, and is in the omnibus form prescribed by chapter 388 of the Acts of 1918. There was a trial by jury and a verdict and judgment accordingly, finding the accused guilty and fixing his punishment at six months in jail and a fine of $500.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

There are but three assignments of error, presenting questions which have been all fully considered and are settled in this court.

The first assignment of error is that "the indictment being for many offenses, and the verdict being general, does not say on which charge (the accused) is guilty."

There is no merit in this assignment. See *Pine & Scott* v. *Commonwealth*, 121 Va. 812, 14 Va. App. 575; *Wilkinson* v. *Commonwealth*, 122 Va. 920; *Hunt* v. *Commonwealth*, 126 Va. 815, 19 Va. App. 545; *Hitt* v. *Commonwealth*, 24 Va. App. —, 131 Va. —.

The second assignment of error is that the court below had "no jurisdiction to try this case because the prohibition law is superseded by United States Senate, known as the 'Volstead act,' and passed by the Congress of the United States."

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This subject was fully considered in *Allen* v. *Commonwealth,* 129 Va. —, 21 Va. App. 615, and the conclusion reached, which is contrary to the position taken in this assignment of error. No reason is stated why we should reach a different conclusion, and we know of none. That conclusion is, therefore, adhered to.

The third and only remaining assignment of error is that "the punishment pronounced is cruel and unusual and is in violation of the Constitution of Virginia."

No reason is presented in support of this assignment of error. There is no merit in this assignment. See *Bracy's Case,* 119 Va. 867, 12 Va. App. 76; *Hart's Case,* 24 Va. App. —, 131 Va.

The case is affirmed.

Affirmed.

PURNELL v. COMMONWEALTH.

(Richmond, January 19, 1922.)

1. RAPE.—Identification of Accused—Evidence.

Error to Circuit Court of Northampton county.

Affirmed.

S. James Turlington and *Elmer W. Somers,* for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

BURKS, J.:

The plaintiff in error, Edward Purnell, was convicted of attempted rape upon Mrs. Elizabeth C. Kelly, and sentenced to be electrocuted. The attempt is clearly and explicitly proved and is in no way controverted. The plaintiff in er-

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ror earnestly contends that he was not the guilty party, and attempts to prove an alibi by his mother and sister, in addition to his own testimony. He also offered testimony to his good character for chastity and for truthfulness. There is no complaint of the rulings of the trial court on the admissibility of evidence, nor on the law applicable to the evidence. The sole question involved and the only one we are asked to consider is, was the evidence sufficient to warrant the jury in finding that the plaintiff in error was the guilty party. The prosecutrix, Mrs. Kelly, after describing the attack upon her, says that when Purnell abandoned his attack he jumped out to the ground, a distance of four or five feet, and that she got to the window by the time he reached the ground, and that she recognized him at once. She admits that she never saw his face, but she is very positive and explicit in her statements on the subject of recognition. The assault was made between eight and twelve o'clock at night, but Mrs. Kelly describes the night as "moonlight; bright as day almost." She was well acquainted with the accused, who had been working for her husband for at least a year and a half, and was in and out of her kitchen almost daily. She testified that when "he went to the window and jumped out I recognized him running through the yard, and I told him not to run, that I knew who he was," and that it was Edward Purnell, the accused; that she saw him again "when he went to the barnyard and when he turned around the cornstack"; that the night was sufficiently bright for her to see him, and that she recognized him from his back and his running; that she "was very familiar with that; I know it was his back," and could not have been any one's else, and that he had "on this khaki-colored clothes, not overalls." She testified further, "I knew who it was when I got a glimpse of him."

Mrs. Kelly also testified that during the struggle she bit her assailant several times hard enough to make a bruise, once on the leg and at another time she did not know where, but thinks once on the arm. The accused at this time was

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wearing shoes, without heels, and they had wires in the soles at the toe that made peculiar marks. Tracks identified as made by these shoes were found in the soil not far from the house, and going in that direction. The accused, however, accounted for these tracks by saying that he had gone to the Kelly residence about two o'clock of the day the offense was committed and had passed along that way in going to the house to get Mr. Kelly's horses which he had borrowed to use in planting potatoes that day. Mr. Kelly, husband of the prosecutrix and a witness for the Commonwealth, testified that he had loaned his horses to the accused, but that he had come for them early in the morning and had come by another route. Sears, another witness for the Commonwealth, also testified that he was planting potatoes on that day on land adjacent to Mr. Kelly and that he saw Purnell about sunset going to the Kelly house in a wagon, but says nothing of having seen him at any other time of that day.

The accused was arrested at his home, about three-quarters of a mile from the Kelly residence, at two o'clock the night of the assault, by Mrs. Kelly's husband and his brother, who was a deputy sheriff. He testified in his own behalf with apparent frankness, and undertook to give an account of his movements that night, and denied positively any connection with the assault. Several witnesses, however, for the Commonwealth testified to prior contradictory statements made by him as to where and with whom he was in the early part of the night, and as to the time he was with those persons. The statements of the accused were, in the main, corroborated by the testimony of his mother and sister, who were in the house with him.

Unless Mrs. Kelly was mistaken as to the identity of her assailant, there can be no doubt as to the guilt of the accused. One of the arguments for the accused to show that she was so mistaken was the failure to find any bruise on the accused resulting from the bites, although he was examined for such bruises at the time of his arrest. Witnesses

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for the Commonwealth testify that the accused raked his finger-nails up his leg when they went to look for the bruises, and that the effect of this upon the skin of a negro would obscure the bruises. The accused and his mother and sister, who were present, denied this allegation.

All of this testimony went before the jury under proper instructions from the court. These instructions emphasized time and again the duty of the jury to be satisfied of the guilt of the accused beyond a reasonable doubt, and that not only the jury as a whole, but each individual juror should be so satisfied, and should not surrender his own convictions simply because the rest of the jury were of a different opinion. They also informed the jury that any fact or facts sufficient to produce a reasonable doubt as to the guilt of the accused need only be established by proof that would be satisfactory to establish such fact or facts in a civil case and that the prisoner was not bound to prove his alibi beyond a reasonable doubt, but only by a preponderance of the evidence. The instructions made it plain to the jury that if there was any doubt as to the identity of the prisoner as the person who committed the offense they should give him the benefit of that doubt. It was the province of the jury to weigh the testimony and to settle all of the disputed facts in the case. They found the accused guilty and annexed the extreme penalty of the law to their finding. The judge of the trial court saw the demeanor of the witnesses on the stand and declined to set the verdict aside. Under these circumstances we are unable to say that the verdict is without evidence to support it, or that it is plainly contrary to the evidence. The judgment of the trial court must, therefore, be affirmed.

Affirmed.

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NUSBAUM, TRUSTEE, v. CITY BANK & TRUST COMPANY.

(*Richmond, January 19, 1922.*)

1. BANKRUPTCY.—Effect Given State Statutes—Rights and Duties of Trustee—Act 1910, sec. 47-a—Assets in Possession of Bankrupt—Automobile—Code 1919, sec. 5224—Preference to Creditors.

Error to Circuit Court of city of Norfolk.

Reversed.

Jas. G. Martin and *Chas. L. Kaufman*, for the plaintiff in error.

L. B. Cox, for the defendant in error.

BURKS, J., absent.

PRENTIS, J.:

The plaintiff, Bertram S. Nusbaum, trustee in bankruptcy for Gatewood & Steinbaugh, Inc., filed his motion against the City Bank and Trust Company, alleging that there had been illegal transfer within the four months preceding the filing of the petition in bankruptcy, whereby the bank, as creditor of the bankrupt, had obtained a greater percentage of its debt than any other creditor of the same class, and that when the transfer was made, the creditor had reasonable cause to believe that such transfer would result in such a preference. There was a jury trial and a verdict in favor of the plaintiff, which the judge of the trial court set aside as contrary to the law and the evidence, and thereupon entered judgment in favor of the defendant, which is here for review.

The pertinent facts as to which there is no conflict are these: The bankrupt corporation filed its petition October 14, 1919, and was subsequently adjudicated a bankrupt. It was engaged as a trader in buying and selling automobile accessories and supplies and in repairing such vehicles, and transacted all of its business in its corporate name, Gatewood & Steinbaugh, Inc. It had ordered thirty automobile trucks from Larrabee-Deyo Motor Truck Co., Inc., under

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a conditional sale contract, to be delivered at stated intervals, for resale, which contract was never recorded. Only one of these trucks appears to have been delivered, and the agreement with reference thereto appears to have been subsequently changed, and thereafter, on October 1, 1919, it was agreed that this truck should be held under a consignment contract with the power to the consignee to sell and obligation to account for the proceeds thereof to the consignor, Larrabee-Deyo Motor Truck Company, Inc. This contract was never recorded. R. A. Williams, secretary of the bankrupt corporation, a few days after the date of this consignment contract, stored the truck in his own name with the Southgate Terminal Corporation on October 3, sold it October 8 for $2,350, and paid the bank $2,250 in settlement of five notes of the corporation, of which only $800 was then due, the said Williams at the time being liable therefor as endorser; the effect of which was to enable the bank to obtain a greater percentage of its debt than any other creditor of the same class.

In the administration of the bankruptcy law, it is perfectly well settled that the State statutes enacted for the protection of creditors are given full force and effect, so far as they are not in conflict with the bankrupt law. It follows, therefore, that a preference or transfer may be unlawful or fraudulent under the statutes of one State which, under identical circumstances, would be held valid in another State. In most of the States, in the absence of a controlling statute, where there is such a bailment as here appears, the title of the bailor is superior to that of the trustee in bankruptcy who takes no title thereto, even if in the bankrupt's possession at the time of his appointment, and the trustee could not set aside a transfer thereof by the bankrupt in anticipation of bankruptcy.

The learned judge of the trial court appears to rest his judgment largely upon the language of section 47-a of the bankrupt act of 1910, where it is said that the trustee "shall be deemed vested with all the rights of a judgment creditor

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holding an execution returned unsatisfied," as though that language and that section defined and limited all of the trustee's rights.

There are, however, several other sections of the act which define the trustee's rights, duties and powers. He takes not only all of the rights of the bankrupt in his property, having power to set aside certain transactions, but he also succeeds to all of the rights of creditors of the bankrupt, including the right to set aside conveyances which bind the bankrupt, and takes title to certain property with which the bankrupt has voluntarily parted and could not reclaim. It is said in 2 Remington on Bankruptcy, page 943, that "it is doubtless true that the trustee's title since the amendment of 1910, is the most extensive and complete of any in jurisprudence."

In *Brown* v. *Crawford*, 252 Fed. 252, this statement appears: "The property to which the trustee succeeds is that which, prior to the fillng of the petition in bankruptcy, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Section 7-a, bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548, Comp. Stat. 1916, sec. 9591). This covers any interest in the property the bankrupt may have had, however minute, that was subject to transfer by him, or levy and sale by judicial process. The statute is designed to be so broad and searching as to comprise all property that the bankrupt may have that may be of use or benefit to him, however small * * * The statute deals with the property of the bankrupt, not with that of another, and is designed to vest the trustee with the broadest rights, remedies and powers commensurate with possessing himself of the property of the bankrupt for the benefit of the creditors. It not only vests the trustee with the rights of the bankrupt, standing in his shoes, but with all the rights of a creditor, whether he or the court is in or out of possession."

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The case of *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, which is cited in the opinion of the trial judge, does not appear to us to be enlightening here, because the question there decided was that an attachment could be prosecuted in a State court, notwithstanding there had been a petition in bankruptcy filed, where the bankruptcy was never adjudicated, but with the sanction of the federal court the property of the debtor was held by a creditors' committee for five years.

The other case cited is *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 60 L. Ed. 275. The question there was whether a contract of conditional sale, with a chattel mortgage back, securing the deferred installments of purchase money, executed more than four months before the bankruptcy, but recorded within less than that period before the bankruptcy, could be set aside as an unlawful preference; and it was held that the mere recordation of the paper within four months was not to be construed as an unlawful transfer within the meaning of the act.

The determination of the precise question here involved depends upon whether or not the automobile truck and its proceeds were assets in the possession of the bankrupt which could have been subjected by its general creditors, and its liability to be thus subjected depends upon whether or not the automobile and the proceeds arising from its sale were acquired by the bankrupt as a trader within the meaning of the Virginia traders' act, Code 1919, sec. 5224. That act provides that if any person transact business as a trader in his own name, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted, then all the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for his debts.

That this corporation was a trader engaged in the busi-

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ness of barter and sale of certain classes of merchandise is perfectly apparent, and we know of no sufficient reason for holding that the automobile truck and its proceeds here involved were not acquired by the bankrupt as a trader. The evidence discloses that it had but one business and no other reason for acquiring it except to sell it.

In *Edmunds* v. *Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472, this court held that pianos and organs which were consigned to the Hobbie Piano Company for sale under written contracts were assets in the possession of the Hobbie Piano Company liable for the satisfaction of the general creditors of that company, and in this connection used this language: "If it were held otherwise, any trader doing business under a general merchant's license, apparently on his own account, could fill his storeroom with consigned goods, create the impression that he was the owner, obtain credit upon the faith thereof, and when his creditors demanded payment, make known for the first time that the goods were not his; and thus he and those who had entrusted him with their goods could perpetrate a fraud upon his creditors. To prevent just such frauds was one of the objects of the statute." 13 Va. Law Reg. 172; *Hoge* v. *Turner*, 96 Va. 632, 32 S. E. 291; *Partlow* v. *Lickliter*, 100 Va. 631, 42 S. E. 671.

The rule is that a preference is unlawful under the bankrupt act, if made within the prescribed four months, if it be alleged and proved that at the time of the transfer the party making it was insolvent, that the property transferred was such that his creditors had the right to have it subjected to their claims, that he intended to create a preference, and that the transferree had reasonable cause to believe that the transferor had such an intention. *In re Leech*, 171 Fed. 625, 96 C. C. A. 424, 22 A. B. R. 599.

In *Chesapeake Shoe Co.* v. *Seldner*, 122 Fed. 594, it is held that the trustee in bankruptcy of a merchant doing business in this State in his own name, takes title, under the Virginia statute, to all the stock in his store, including goods held by him on consignment to which he had no title as between himself and the consignor.

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In the recent case of *Virginia Book Co.* v. *Sites,* 254 Fed. 46, this appears: The bankrupt trader had been for a year or more the local agent of the Virginia Book Company, at Salem, Va., for the sale on commission of school books, consigned to him under an unrecorded contract by which the legal title of the books remained in the book company. Two days before the petition in bankruptcy was filed, and when the book company had reasonable cause to believe that the trader was insolvent, it canceled his agency and repossessed itself of such of the books as he then had. Upon petition of the trustee in bankruptcy, it was held that by virtue of the traders' act and its construction by the Virginia courts, the trustee could recover, and that the return of the books to the consignor under such circumstances was a voidable preference under the bankrupt act.

Observe that in the case here under review there is no question between the trustee and the original vendor, who was also consignor of the automobile truck, nor between an innocent purchaser thereof for value and the trustee. The question here at issue is between the trustee and the bank as a creditor of the bankrupt who by means of the transaction which is attacked has received a greater percentage of its debt than the other creditors.

Mississippi has a statute quite similar to the Virginia traders' act. A company dealing in hardware which had transacted business in its own name, when adjudicated a bankrupt had in its possession as agent for the manufacturer an engine which it had been demonstrating in the hope of making a sale. In an action brought by the trustee in bankruptcy against the manufacturer of the engine, it was held, that because of this statute the creditors were entitled to treat the engine as the property of the bankrupt company, and that the trustee in bankruptcy was entitled thereto. *Gallaspy* v. *International Harvester Co. of America,* 109 Miss. 136, 67 So. 904.

Unless this line of cases is to be repudiated, it seems clear to us that the trial court erred in setting aside the

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verdict. The main purpose of the bankrupt act is to enforce equality as between the creditors of the same class, and hence it avoids all preferences made within the four months preceding the filing of the petition in bankruptcy. It is perfectly clear from the authorities that if the automobile truck had not been sold at the time the petition was filed, it would have constituted a part of the assets of the bankrupt for distribution among its creditors. It is also clear that if the proceeds of such sale had been held by the bankrupt at that time they would have passed as a part of his assets to the trustee in bankruptcy. It seems to us to follow logically and inevitably that as either the property or the proceeds arising from its sale could have been subjected by the general creditors to their debts under the Virginia statute, so the disposition thereof by the bankrupt for the benefit of one creditor in diminution of the assets to which all the creditors could have resorted, is clearly within the inhibition of the bankrupt act. Such property, being liable under the Virginia statute, is *quoad* his creditors like the other property of the trader to which he has absolute title, and hence in case of bankruptcy constitutes assets for distribution to his creditors. If we consider the question an open one, we might elaborate the reasons for this conclusion, but following the cases which we have cited, we regard it as closed, and, however great the possible hardship may be in some instances, those who deal with merchants in Virginia should take notice of the Virginia traders' act and be observant of the risks they incur as well as of the advantage accruing thereunder.

The judgment of the trial court in favor of the defendant will, therefore, be reversed, and we will enter judgment here in accordance with the verdict of the jury in favor of the plaintiff.

Reversed.

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PAGE *v.* PAGE.

(*Richmond, January 19, 1922.*)

1. DEED.—Reformation—Correction of Mistake—Resulting Trust.—Intention—Evidence.

Appeal from Chancery Court of city of Richmond.

Reversed.

S. S. Patterson and *J. H. Rives, Jr.*, for the appellant.

Brockenbrough Lamb and *Hill Montague*, for the appellee.

Burks, J., absent.

Colona S. Nuckolls and husband, by deed of date May 1, 1912, acknowledged on May 2, 1912, and recorded on May 3, 1912, conveyed to Luther T. Page (the appellee) and Mary A. Page, his wife (the appellant), a certain house and lot in the city of Richmond, in consideration of the sum of $2,619.00 purchase money, the entire amount of which was furnished by the appellee.

In January, 1916, the appellee filed his bill in the Chancery Court of the city of Richmond against the appellant, alleging that the purchase of said house and lot was made from Mrs. Nuckolls by appellee acting through his father, J. A. Page, as his sole agent and as such entrusted with the whole matter; that it was never the intention of appellee nor the intention of his father to have any interest in said property conveyed to appellant; that the insertion of appellant's name in the deed from Mrs. Nuckolls and husband as one of the grantees was a mistake and oversight; that neither appellee nor his father had any knowledge or intimation that the effect of the deed was to convey an undivided one-half interest in said property to appellant; that appellee could account for the insertion of the name of appellant in the deed only by reason of the fact that a certain deed of trust, which is referred to below in the opinion of the court, was already executed and was in possession of the scrivener when the said deed from Mrs. Nuckolls and

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husband was prepared; that this mistake was due to an oversight of the scrivener; and that the effect thereof was not brought to the attention of appellee or of his father until on or about December 20, 1915, up to which time appellee believed that the title to said property was in himself alone. The bill sets out the non-residence of the appellant; asks that she be proceeded against as such by order of publication and prays that the aforesaid deed from Mrs. Nuckolls and husband may be corrected, that the whole title to said property may be declared to be in appellee to the exclusion of appellant from all interest therein; that the court may impress the said property with a resulting trust in favor of appellee by virtue of the fact that he supplied the whole of the purchase money with the intention and belief that he was taking the title in his own name; and for general relief.

The appellant was accordingly proceeded against by order of publication; the depositions of the appellee, his father and mother and one Paul P. Shafer were duly taken and filed in behalf of the appellee, and the appellant failing to appear, on April 4, 1916, decree was entered in the cause holding that the appellee paid the whole of said purchase money; that he did not intend to make any gift or settlement of any part of the property to or upon the appellant; that the intention of the parties to the transaction was to have the property conveyed to appellee alone; that the title was taken in the joint names of appellee and appellant through mistake and oversight and contrary to the intention of the parties; and the court accordingly decreed that the property is impressed with a trust in favor of appellee, who was accordingly declared to be sole owner of the entire beneficial interest therein, etc., and the cause was stricken from the docket.

On May 3, 1916, the appellant appeared by counsel and asked leave to file her petition reinstating the cause upon the docket, which by leave of court, in accordance with the statute in such case made and provided, was accordingly

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done. This petition alleged that during the existence of the marriage relationship of appellant and appellee, the appellee, in order to induce the appellant to live in the city of Richmond agreed that he would purchase and pay for the real estate aforesaid and have same conveyed to appellant and himself; that the deed from Mrs. Nuckolls and husband was made in pursuance of such agreement; and that there was no mistake whatever in such deed so conveying the property, the purpose of the conveyance being to give appellant one-half interest therein.

Subsequently the apellant filed her answer in the cause, taking the same position taken in her position aforesaid, with greater elaboration of allegations of details, and among the latter alleged that, after the father of appellee had selected the house and lot aforesaid as a purchase, appellee sent appellant from Cleves, Ohio, where the two were then residing, "to Richmond to look at and see if it (the property) suited her, as it had been agreed between them that no house should be purchased unless respondent (appellant) was satisfied with it." That appellant "inspected the said house and lot * * * and approved of the purchase"; and that at that time appellee had money on deposit in the Planters' National Bank of Richmond amounting to $819.00 which he authorized appellant to draw out of bank and use in part payment of the purchase money for said property; and that the authority to draw the money out of bank existed, was evidenced by a certain letter from the cashier of the bank addressed to appellee and a letter from appellee to appellant which were filed as exhibits with such answer.

Thereupon, the depositions of appellant, her mother and a sister and of appellee were duly taken and filed in behalf of the appellant; and thereafter the depositions of the said father and mother of appellee were again taken and filed in behalf of appellee, the father being recalled as a witness a number of times, and various exhibits were filed along with the depositions.

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Thereafter, on October 10, 1919, the decree appealed from was entered, which adhered to the holdings of the former decree of April 4, 1916.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The controlling question presented for our decision on the appeal in this case is one of fact. The law on the subject is not in controversy.

The appellee seeks by parol evidence to correct an alleged mistake in a deed and to establish (a) a resulting trust, or (b) an express trust, in his favor, on the ground that the appellee not only paid the whole purchase money, but intended and directed the conveyance to be made to himself alone. The law on these subjects is well settled and is admittedly correctly laid down in *Taylor* v. *Delaney*, 118 Va. 203.

In *Taylor* v. *Delaney*, the husband, Delaney, entered into negotiations with a land improvement company for the purchase of certain land. His wife attended to the payment of the purchase money, closing the purchase, and took the deed from the company in her name as sole grantee. The bill filed by the husband alleged that the purchase money was entirely furnished by him; that he directed his wife to have the property conveyed to him and her jointly; and that as the conveyance was not so made she held the land in trust, one-half for herself and one-half for him in *fee*.

(1) On the subject of the alleged resulting trust, the court, at pp. 207-8, quoting from *Irvine* v. *Greener*, 73 Va. (32 Gratt.) 411, said:

"The doctrine generally, if not universally, recognized is that when a conveyance of real estate is made to one person, and the consideration paid by another, it is presumed that the party advancing the money intended a benefit to himself and accordingly a resulting trust is raised in his behalf. But when the conveyance is taken to a wife or child, or to any other person for whom the purchaser is under an obligation to provide, no such presumption at-

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taches. On the contrary, the inference in such case is that the purchase was designed as an advancement to the person to whom the conveyance is made. It is, however, always a question of intention, and the trust in favor of the wife or child may be rebutted by parol proof, showing that the party intended the purchase for his own benefit exclusively."

The opinion in *Taylor* v. *Delaney* thereupon continues as follows:

"In *Dick* v. *Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837, it is said that 'a resulting trust does not arise in favor of a person who furnishes money with which to purchase property, the conveyance being taken in the name of another, if there is a legal and moral obligation on the part of the former to provide for the latter, as where the parties are wife or child of the person whose funds have been so employed. The presumption that under such circumstances no trust was intended is one of fact, and not of law, and may be rebutted by evidence of circumstances tending to show the existence of a trust. Declarations of a husband after the death of his wife are not sufficient to establish a resulting trust in his favor in land purchased and paid for by him and by his direction conveyed to her.' In a note to this case in 56 Am. St. Rep. at p. 843, it is said: 'When a person making a purchase of land in the name of another and paying the consideration himself is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but it will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser.'

"It is clear, therefore, upon the law, that no trust resulted to Delaney, even if it were conceded that he paid the purchase money, for the presumption would be that it was intended for the benefit of his wife. If, therefore, he prevails in this case it must be by proof of an express trust. * * *."

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(2) On the subject of the alleged express trust, the court held, as correctly summarized in the syllabus, as follows:

"In order to establish an express trust in real estate by parol evidence, the declaration must be unequivocal and explicit and established by clear and convincing testimony."

In the instant case, as in *Taylor* v. *Delaney*, no resulting trust in favor of the appellee arises from the fact that he furnished all of the purchase money, but the deed will be regarded *prima facie* as making a valid settlement upon the wife to the extent of the interest in the real estate conveyed to her thereby. And in the instant case, as said in *Taylor* v. *Delaney*, if the appellee prevails "it must be by proof of an express trust." Upon this issue the burden of proof is, of course, upon the appellee, and the character of proof he must adduce is that above stated.

The controlling question of fact presented for our decision is, therefore, the following:

1. Has the appellee established the fact that he intended and directed the conveyance in question to be made to himself alone, by evidence which is "unequivocal and explicit," and "by clear and convincing testimony?"

The question must be answered in the negative.

The testimony for appellant and appellee is in irreconcilable conflict and in such direct conflict on many material matters that one rises from repeated readings of it with the conviction that the testimony of either one party and family witnesses or of the other party and family witnesses is almost wholly unreliable, for the testimony on both sides about material facts, undoubtedly known to these parties and those witnesses, cannot be true. Which is to be believed?

The reliability of the testimony of the appellee and of his father and mother is seriously discredited by the omission from the allegations of the bill, although otherwise in much detail, and from the testimony of appellee and his father and mother, taken in the cause before appellant made any appearance therein, of all mention of the fact that appel-

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lant was present at the time or took any part in attending to the matter of closing the purchase and taking the deed in question. In view of the high standing of counsel for appellee, we regard the allegations of the bill as containing the statement to counsel by appellee or his father, of the facts of the case to be stated in the bill as represented to such counsel at the time. And so far did the bill and this testimony go in making out a case in which the appellant had no connection with the transaction, that the bill omits all mention thereof as aforesaid, and all three of these witnesses testified that the mother of appellee made a loan to him of the money he needed to pay the purchase money for the property, in addition to the $1,800.00 borrowed by appellee of the Virginia Building and Loan Association, and they testify positively as to the details of this borrowing by appellee of his mother. J. A. Page testified at that time that when, acting as the agent of the appellee, he came to pay the $2,618.00 balance of purchase money to J. Thompson Brown, real estate agents for Mrs. Nuckolls, the vendor, he (J. A. Page) obtained the $1,800.00 from the Building and Loan Association and got the rest of the money from the mother of appellee, and thus made up the $2,618 and paid it over to such real estate agents on May 3, 1912. Appellee testifies at that time that all of the purchase money except what was borrowed of the Building and Loan Association was borrowed by him of his mother. The mother testifies at that time that she lent this money to her son, the appellee, and handed it to the father, J. A. Page, for him to use in making up the purchase money aforesaid. She goes into further details. She was asked if her son, the appellee, gave her a note for this money and answers as follows: "Yes, sir, he didn't right away, but two or three days after he handed it to me, and said I had better take it"; and she files the note referred to, which is for $1,000, dated at Richmond, May 12, 1912, payable on demand, and signed by the appellee.

As contrasted with this positive and detailed testimony

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of the three witnesses last named, it is developed by the proof introduced after the pleadings of appellant are filed, and is expressly admitted by appellee and his father in their subsequent depositions, that the money, in addition to the $1,800 borrowed from the Building and Loan Association, used to pay the purchase money to said real estate agents for Mrs. Nuckolls, consisted of a balance of $818.00, which belonged to appellee and was in the Planters' National Bank at the time, and which he authorized his wife to draw out of bank and which she did draw out of bank and hand to J. A. Page, and which he used accordingly. Moreover, it appears from such later proof, and is admitted by appellee and J. A. Page in their later depositions, that they both had prominently in mind when the negotiations for the purchase from Mrs. Nuckolls was entered upon, that this money belonged to appellee was in said bank and had the fixed intention to use it to pay on account of such purchase money. And all of this is so clearly shown by such testimony, after the letter from the bank cashier and that from appellee above referred to was filed as aforesaid by appellant, and is especially disclosed in the letter of April 13, 1912, to appellee from his father filed in evidence, that it is plain that both appellee and the father must have had an ineradicable impression made on their minds at the time, inducing an unforgetable recollection of the source from which this money came, so that their testimony and that of the mother first given as aforesaid as to such source has the appearance of a pure fabrication. This later uncontroverted testimony shows that if the $1,000.00 was borrowed of the mother at all, which is left in much doubt, this was not done until in July or August, 1912, when, after an absence of at least four months in Cleves, Ohio, appellee came to Richmond, so that the note aforesaid could not have been handed to her as the mother testified and its date indicates that it was not a genuine note. Considering these matters in the most favorable light for appellee we are forced to the conclusion, therefore, that he and his family witnesses in their statements of facts are unreliable.

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Again: J. A. Page, the father of appellee, on April 12, 1912, while appellant was with her husband at Cleves, Ohio, undoubtedly initiated in Richmond the transaction of the purchase of the property aforesaid, in the name of appellee as the purchaser and made an application to the Building and Loan Association for a loan from it to appellee on such property as purchased by appellee, but not yet conveyed; and as a consequence the bond and deed of trust to secure to the association such loan were drawn by the attorney for the latter upon the assumption that when the deed from Mrs. Colona S. Nuckolls and husband came to be made it would be made to appellee as grantee. This explains the recital in the deed of trust to the effect that the real estate thereby conveyed is "the same real estate conveyed to Luther T. Page by deed from Colona L. Nuckolls and W. R. Nuckolls, her husband, by deed April, 1912, to be recorded." But this was purely an assumption, albeit a natural assumption, from the form in which the father of appellee had initiated the transaction. All of this, however, and the other evidence in the case tending to show that up to the time when appellant arrived in Richmond from Cleves, Ohio (about April 20th), the acts of J. A. Page and of the association were all in conformity with the expectation that the deed would be made to appellee alone (such as Mr. Shafer's testimony as to the custom of the association, the form of the bond and the recital aforesaid in the deed of trust, etc.), lose their force as evidence in behalf of appellee when it is considered that all of this was the result of action of the father before appellant arrived on the scene, and that there is evidence in the case for appellant which, if true, warrants the inference that appellee had led his wife to believe that he intended to have the property conveyed to them jointly, and at this time expected and intended to do so, if she insisted upon it as the condition upon which she would make her home in Richmond and continue to live with him, and that appellee had so informed and directed his father to act accordingly; but that appellee

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and his father were in collusion to deceive appellant about the matter if they could, and they both allowed the transaction to proceed in the form in which it was begun until appellant came to Richmond and was there on the lookout for her interest in the matter. The further inference from the evidence for appellant is that, finding that appellant's name would have to appear in the deed as grantee to satisfy her, J. A. Page, in accordance with his instructions from appellee, thereupon, while appellant was in Richmond and before the deed from Mrs. Nuckolls and husband was drawn, directed that appellant's name be included in the deed as it was.

This theory seems to us to be more in accord with the whole of the evidence in the case, which seems reliable, than any other.

The theory of the bill of appellee, that the draftsman of the deed from Mrs. Nuckolls and husband had the deed of trust before him and was thereby misled into inserting the name of appellant as one of the grantees in the deed of bargain and sale, is wholly without evidence to support it. In the first place, the whole tenor of the deed of trust manifests that it contemplated that the deed of bargain and sale would be made to appellee alone as grantee. In the second place, there is absolutely no evidence that the scrivener of the latter deed had the former before him. There is, indeed, no testimony in the case undertaking to say who this scrivener was. The original deed is shown to have been on the form of J. Thompson Brown & Co. and the only inference which is consistent with the evidence is that the deed was drawn by some one in the office of J. Thompson Brown & Co., agents for Mrs. Nuckolls, the vendor. The deed was acknowledged by Mrs. Nuckolls and husband on May 2, 1912, before Edw. H. Brown, Notary Public. Neither he nor any one from the office of J. Thompson Brown was examined as a witness in the case. Neither Mrs. Nuckolls nor her husband is examined as a witness, the only reason vouched in the record for not doing so being the testimony of J. A. Page

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to the effect that he couldn't find them in the city of Richmond,—that perhaps they had moved away. No effort to find their whereabouts elsewhere is shown, nor any reason why some one from Brown & Co.'s offce was not examined. There is no evidence that the deed of trust was ever in the office of that company. The deed of trust, after its draft by the attorney for the Building and Loan Association, was mailed to appellee in Cleves, Ohio, signed and acknowledged by him there on April 26th, mailed back on that day with a letter to appellant of that date (see Ex. J. A. P. "Z-6"), was acknowledged in Richmond by appellant on April 30th before C. T. Loehr, Notary Public, who was also at that time secretary and treasurer of the Building and Loan Association, and this acknoweldgement was taken by Mr. Loehr in his office according to the testimony of J. A. Page. Mr. Loehr died before the depositions in the case were taken, so we do not have his testimony. There is no evidence tending to show that Mr. Loehr drew the deed of bargain and sale. The only evidence of any connection of his with the latter deed is that of J. A. Page, who at one time says that after the Building and Loan Association agreed to lend the $1800.00, Mr. Loehr "went down to see Mr. Brown about the deed;" and at one place in his depositions, he says that on the occasion when the $2618.00 was paid over to Brown & Co., on May 3rd, that company handed him (Page) the deed of bargain and sale; that he did not open the deed to see how the property was conveyed, but handed it to Mr. Loehr. At another place in his depositions this witness says that on this occasion "Mr. Loehr took it (the deed) from J. Thompson Brown." That Mr. Loehr then read the deed and said "It's all right, Mr. Page, you can pay Mr. Brown," and that witness never looked at the deed at all. This witness is asked, at another place in his depositions, "How do you account for this deed having been made out in the names of both your son and his wife instead of in the name of your son?", and answers: "I don't know how to account for it—I didn't see the deed until after I had paid the money."

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The fact that the custom of the Building and Loan Association, (however universal according to Mr. Shafer's testimony), required the appellant as well as appellee to sign the bond for the money borrowed of the association if she was to be joint grantee of the property; and the fact that the bond and deed of trust were drawn and signed as they were, are not circumstances inconsistent with the association in fact lending the money in this individual instance upon the bond and deed of trust as executed, because the association, before the money was actually loaned, was, as a matter of fact, through Mr. Loehr, informed that the property was in truth conveyed to appellant as a joint grantee, and also as a matter of fact made the loan notwithstanding, Mr. Lohr, secretary and treasurer of the association, acting in the matter for the association as well as a friend of J. A. Page, read the deed of bargain and sale as it was in fact executed before the money passed and approved of the deed and lent the money on the bond and deed of trust as they stood, as is shown by the testimony of J. A. Page himself. It seems plain that the bond and deed of trust were drawn by one scrivener upon the assumption that the deed would be made to appellee alone, in accordance with the initial form of the purchase, and before the deed of bargain and sale was drawn. And that the deed of bargain and sale was drawn at a later time, after appellant arrived in Richmond, by another scrivener, who did not have before him the bond or deed of trust.

J. A. Page does not anywhere in his depositions testify that he at any time directed that the deed of bargain and sale should be made to his son alone. He does deny that he ever gave any direction to anyone that the deed should be made to the son and appellant. His position is that he assumed that the deed would be made to his son alone and never knew the contrary until in December 1915 just before this suit was brought.

It seems to us extremely improbable that the deed of bargain and sale would have included the name of appellant as

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grantee without the direction or knowledge and consent of J. A. Page at the time. He initiated the transaction in the name of appellee as the sole purchaser. He, as agent for appellee, had control of the whole transaction from the beginning to the close of it, by the paying over of the purchase money through his hands and the taking of the deed. Even if appellant had undertaken without his knowledge to direct that her name be included as grantee in the deed, of which there is no suggestion in the testimony anywhere, surely the grantors or their agents would not, under the circumstances, have acted in the premises without the direction or known assent of J. A. Page directly or through some one known to be acting for him.

Upon consideration of all the evidence in the case, we feel that some one must have directed Brown & Co. to have appellant's name included as grantee in the deed of bargain and sale. There is no evidence tending to show that appellant did this.

All the evidence in the case points to Mr. Loehr as the person who gave this direction to Brown & Company. The testimony of of J. A. Page shows that he entrusted this part of the transaction to Mr. Loehr. It is true that J. A. Page, as aforesaid, denies that he gave any one the direction to have the deed of bargain and sale made to appellant as one of the grantees. But this is absolutely inconsistent with what he testifies was the conduct of Mr. Loehr when the latter read the deed of bargain and sale as aforesaid, at the time of its delivery by Brown & Co. Mr. Loehr then saw that appellant was one of the grantees; and his thereupon saying, "It's all right, Mr. Page, you can pay Mr. Brown," evidences unmistakably that Mr. Loehr found the deed to be in the form he expected it to be and which he knew J. A. Page expected it to be, for otherwise, being the man of character and experience in such matters, which J. A. Page and the other evidence in the record indicates him to have been, he would undoubtedly have called attention to the fact that the name of the appellant was in the deed as grantee.

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And especially would he have otherwise done this since appellant being a grantee put this transaction out of line with the uniform custom of his association in making such loans, as testified to by Mr. Shafer, in that the bond and deed of trust were drawn and executed upon the assumption that the appellee would be the sole grantee. Mr. Loehr must have been well assured of the fact that J. A. Page, acting for appellee, wished the deed of bargain and sale to be made as it was and that Mr. Loehr's association should make no objection to making the loan although the deed was in that form, and should let the transaction be closed notwithstanding, as an exception to the custom of the association aforesaid, or Mr. Loehr would, on his association's account, have made objection to the form of the deed in the particular in question.

The testimony of appellant on the subject, it is true, is vague, conflicting and inconsistent, but the preponderance of the evidence would seem to show that appellant and J. A. Page were present together with Mr. Loehr in Richmond, between April 20th and May 3rd, inclusive, at least on one occasion, and perhaps on more than one, and that both appellant and J. A. Page then gave Mr. Loehr to understand that the deed of bargain and sale was to be made to both appellee and appellant. That J. A. Page on the occasion, or on one of the occasions referred to, authorized Mr. Loehr to direct Brown & Co. to draw the deed accordingly. That this action of J. A. Page was within the scope of his authority from appellee. That Mr. Loehr was the only personwho communicated with Brown & Co. on the subject. That Mr. Loehr as thus authorized by J. A. Page, acting for appellee, directed the deed to be drawn as it was drawn and executed. And that J. A. Page fully understood at the time the deed was taken that it was so drawn.

It is well settled that under such circumstances appellee is bound by such action, notice to and knowledge of J. A. Page, his agent. 2 Mechem on Agency (2nd ed.) sec. 1803, p. 1384; *Easley* v. *Barksdale*, 75 Va. 283.

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Such view of the preponderance of the evidence on the controlling question of fact in the case, is strengthened by the consideration of the following matters.

The testimony of appellee is very positive that he never at any time during his married life contemplated buying a home in Richmond or of living there as his home, and that he bought the property in question solely as an investment. In a letter of his to appellant, however, dated January 28, 1912, filed in evidence, he says: "Now I got a nice letter from home; and they want us to come down there and buy a little home and live there. They want to sell *there* home and buy a nice place where they can have a big store and want us to take hold of it and see if we cannot be happy together. I think they know now they cannot separate us, and they know now that I love you, so they are willing to help us now. Write me at once and tell me just what you think and I will do as you say."

In this quotation it will be also noticed that there is a reference to the father and mother of appellee wanting to sell their home. One of the grounds much urged as discrediting the testimony of appellant is that she testiefies that at some previous time appellee proposed to buy a lot from his father and have it conveyed in their joint names; whereas in the depositions for appellee it is positively stated by appellee and his father that in 1912 and during many years prior thereto the father owned no real estate whatever. Either this statement in this letter is untrue, or this testimony of appellee and his father is untrue. Here is but another circumstance showing how little dependence can be placed upon the statements of the appellee.

Again: The testimony of the appellant and of her mother and sister is so full of many references to the fact that appellee continued to make frequent remittances to his father, (once every two or three weeks or sometimes at intervals of as long as a month, during his married life, as testified to by appellee), against the remonstrances of appellant, and to the urging of appellant upon appellee of her wish that

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he would buy a home and take the title to it in their joint names, and to appellee's sometimes agreeing to so and sometimes refusing to do so, and of the part which this played in the alternate coolness and warmth of the marital relations of the appellant and appellee,—all of which is so in accord with human nature and naturally to be expected under the circumstances,—that we are impressed with the truth of much of this testimony of and for appellant. And yet, appellee, in his testimony, unqualifiedly denies that during his whole married life there was ever any talk between him and his wife on the subject of his buying a home and putting it in their joint names, or that there was ever even any conversation between them "in reference to purchasing any property for a home!" And these positive denials are repeated time and again by appellee in his testimony. This leaves an impression very unfavorable to the credibility of appellee's testimony, especially as, in addition to the testimony of and for appellant on the subject, which seems to bear the indicia of truth, as aforesaid, and the letter above mentioned on the subject of buying a home in Richmond, we find in a letter of appellee to appellant in evidence, of date of January 21, 1912, the statement that he had written to a person whom he names, asking him to try and get appellee a position as motorman, at some place not mentioned in the letter, and says that "If he gets me the job, why we can buy a little home out there and live more happy."

It is true that the fact that no express reference is found in the letters of appellee filed in evidence to any undertaking on his part to have the property in question, or any property, conveyed to his wife as joint grantee with himself, or to any conveyance to appellant, is a strong circumstance tending to show that no such intention ever existed; especially as appellant claimed to be able to produce letters containing such undertaking and failed to do so. But the correspondence in evidence, five letters from appellee to appellant and one from J. A. Page to appellee being introduced, is not incon-

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sistent with the inferences we have above drawn as warranted by the preponderance of the evidence when the unreliability of the testimony of and for the appellee is considered.

However, even if we were mistaken in drawing the inferences aforesaid from the evidence, we cannot say that the appellee has established the fact that he directed the deed in question to be made to himself alone, by evidence which measures up to the legal standard required in such cases.

In view of this conclusion it is unnecessary for us to deal with a number of other circumstances in evidence, concerning occurrences following after the taking and the recordation of the deed of bargain and sale.

The decree under review will be set aside and annulled and we will enter our decree in favor of the appellant, on the ground that the appellee has failed to sustain the case alleged in his bill by that degree of proof which is required in such cases, and dismissing the suit, with costs to appellant.

Reversed and final decree.

POLLARD *v.* COMMONWEALTH.

1. INTOXICATING LIQUORS.—Indictment—Demurrer—Effect of Volstead Act and 18th Amendment U. S. Const.—Charge of Several Violations in Single Count—Importation of Ardent Spirits.

Error to Corporation Court of city of Norfolk.

Affirmed.

N. T. Green, for the plaintiff in error.

Attorney General John R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the defendant in error.

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BURKS, J.:

The plaintiff in error, hereinafter called the defendant, was indicted for a violation of the Prohibition Act (Acts 1918, p. 578, Ch. 388). The first count is in the form prescribed by section 7 of the act, usually called the omnibus count. The second charges an unlawful transportation of ardent spirits from one point in the state to another point in the State, and the third count charges an unlawful bringing of ardent spirits into the State from a point without the State. The defendant demurred to the indictment and to each count thereof. The demurrer was overruled. Thereupon the defendant was put upon his trial upon the merits and found guilty.

The only error assigned is the judgment of the trial court overruling the demurrer. The grounds of demurrer were as follows:

"1. The Eighteenth Amendment of the Constitution of the United States has entirely annulled and superseded the State law and statute under which this indictment purports to be found.

"The Act of Congress commonly known as the Volstead Act is the only statute now existing in this jurisdiction under which such a prosecution as this against this defendant can now be had and said Volstead Act has superseded the provisions of the State law under which this indictment is found relative to the charges made in said indictment against this defendant.

"3. The only power the State of Virginia has now relative to intoxicating liquors is derived from the Eighteenth Amendment of the Constitution of the United States and the State can enact no law or make anything relative to intoxicating liquors an offense which cannot be an offense under said Eighteenth Amendment and the indictment in this case attempts to make the simple transportation of intoxicating liquors a criminal offense when only transportation for beverage purposes can be made an offense.

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"4. The said indictment and each count thereof does not inform the defendant of the nature and causes of the charges against him and is therefore in conflict with the Fourteenth Amendment of the Constitution of the United States declaring that no person can be deprived of his liberty without due process of law."

The first two assignments of error were fully considered by this court and overruled in *Allen* v. *Commonwealth*, 21 Va. App. 615, and need not be further noticed. The fourth assignment of error calls in question the validity of section 7 of the act permitting a number of violations of the act to be charged in a single count in the manner prescribed by that section. This assignment was fully considered by a full bench in *Pine* v. *Commonwealth*, 121 Va. 812, and a unanimous conclusion reached upholding the validity of that section of the act. The case has been repeatedly cited with approval since the decision was made, and we see no reason to change the conclusion then reached.

The third ground of demurrer is founded on the third count of the indictment which charged the defendant with transportation of ardent spirits into this State for use in this State from a point without the State. This ground of demurrer calls in question the validity of so much of section 39 of the Prohibition Act as forbids the importation of ardent spirits into the State from a point without the State on the ground that the section is nullified by the Eighteenth Amendment of the Constitution of the United States. This amendment, so far as need be recited, is as follows:

"Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all the territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

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It is argued that since the adoption of the Eighteenth Amendment "the only power now possessed by congress or by the several States under this amendment is to enact appropriate legislation to prevent the transportation for *beverage purposes,* of intoxicating liquors into a State. Congress cannot and the several States cannot prevent its transportation *for any other purpose.* Such laws which absolutely prohibit *all* transportation of ardent spirits in their borders and which were valid by reason of the Webb-Kenyon Act, necessarily became, upon the adoption of the Eighteenth Amendment, invalid and of no force. Only such laws as forbid the transportation for beverage purposes of ardent spirits into their territory remain valid. Congress cannot now enact any law forbidding the transportation of liquor for any other purposes than for beverage purposes."

Such is not the proper interpretation of the Eighteenth Amendment. The object of the amendment was not to curtail the powers of congress but to confer upon congress powers which it did not theretofore possess; nor, as pointed out in the *Allen case, supra,* was it the intention of the amendment to take away the police powers of the State over the subject of intoxicating liquor. So far as congress was concerned the amendment was a grant of power and not a restriction or curtailment of existing powers. Prior to the amendment congress had full power under the Commerce clause to regulate or prohibit the transportation of intoxicating liquors in interstate commerce. This power it exercised by the Webb-Kenyon Act which prohibited absolutely and entirely the transportation of ardent spirits into any State from a point without that State in violation of any law of said State, (57 U. S. Sta. at L. 699), and the validity of this enactment was upheld in *James Clark Distillery Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, 61 Law ed. 325. This statute was enacted in aid of state statutes on prohibition and enabled such States to absolutely prohibit the bringing into the State of intoxicating liquors for use therein. The power of congress to regulate or to prohibit

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the transportation of intoxicating liquors in interstate commerce was fully covered by the commerce clause of the constitution, and that power was not taken away or curtailed by the Eighteenth Amendment. There is nothing in that amendment which takes away from congress the power to enact any statute deemed necessary to make prohibition effective, nor to prohibit the States from enacting such laws as may be necessary for the same purpose, provided only, that the State laws do not affect offenses against the United States created by act of congress. The tenth amendment of the United States Constitution expressly provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." So much of the Webb-Kenyon act as is not in conflict with the Volstead Act is still kept in force by section 35 of the Volstead Act declaring that "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as an addition to the existing laws." Under the Webb-Kenyon Act the State had ample power to prevent the importation of intoxicating liquor from without its borders. *Taylor's Case*, 117 Va. 909. This provision of that act is still in force, and consequently may still be taken advantage of by the State. Section 39 of the Prohibition Act of this State is not in conflict with either the Eighteenth Amendment or the Volstead Act and is still in force. The demurrer, therefore, to the third count of the indictment was properly overruled.

For the reasons stated the judgment of the trial court must be affirmed.

Affirmed.

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PRICE v. COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. JUSTICES OF THF PEACE.—Criminal Liability for Errors Committed— Good Faith—Intoxicating Liquors—Proof of Character of Liquor by Person Requested to Drink—Instructions—Partial View of Evidence—Expression of Opinion by Trial Judge that Case was One of Violation of Prohibition Law.

Error to Circuit Court of Brunswick county.

Reversed.

E. P. Buford and *Marvin Smithey*, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

The indictment charges that the accused "did unlawfully dispense and give away ardent spirits," naming the date and fixing the venue of the alleged offense.

There is but little, if any conflict in the testimony in the case, and the material facts, as the jury were warranted in finding them, and the testimony of and for the accused, may be stated as follows:

The accused is a justice of the peace and has held this office since 1911. On the date named in the indictment, the accused issued a search warrant for the premises of one James Robinson, having cause to believe that ardent spirits were there stored contrary to law. The warrant was given to the deputy sheriff to be executed, who organized a posse to accompany him to the premises in question. Some hours later, upon the same day, the officer and the posse returned with several runlets and vessels, supposed to contain ardent spirits which had been found on the premises of James Robinson. The officer and posse entered the office of the accused upon their return, conveying the liquor before the accused,

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and a considerable crowd of people also at the same time entered the room. Thereupon the accused asked several of the bystanders their opinion as to what the liquor was. One of them smelt it, not tasting it, and expressed the opinion that it was not whiskey, but burnt molasses. The accused asked another person "to go get a glass and try it," telling this person "to pour out some and see what it is." This person poured out nearly a glass full and drank it, and said that "if 'twas whiskey it was the meanest stuff he ever tasted." The accused said to another person: "We have something here, we don't know what it is. Taste it and see." Some one passed to this person a glass and he took "about two fingers" and drank it, and said that it was whiskey. The accused beckoned to another person and made the same statement and request last mentioned of him, adding, "I know you are a good judge of liquor." This person took "a good-size drink of it," and said he thought it was mean corn whiskey. The accused said to another person that he wanted "some good judge of liquor to see whether the stuff was whiskey or not," and asked him to taste it. This person took between a teaspoonful and tablespoonful of it and drank it, and said that it tasted like liquor to him. Another person, named Parrish, who had been a distiller, came into the room, and the accused said: "Here is Dad Parrish. He can tell whether it is whiskey or not." Parrish didn't taste the liquor, but rubbed some of it between his hands and stated that the "stuff" appeared to him to be a "poor grade of corn liquor that is the first run of the still, and did not appear to be fit to drink."

The accused testified that he "always endeavored in such cases to determine whether the liquor in question is ardent spirits before sending the case on to the grand jury, in order to avoid sending on a frivolous case and in order to do the prisoner justice.' That "he, therefore, in the case of James Robinson, being uncertain of the character of the liquid, asked two or three persons to taste it and tell him what it was. That opinions varied, but witness (the accused) finally concluded that the liquid was ardent spirits,

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and sent the case on for trial. That witness (the accused) did not dispense ardent spirits within the meaning of the prohibition law, but was conscientiously trying to ascertain what his duty was in regard to sending the case on for trial."

The former Commonwealth's attorney of the county, a witness for the accused, testified that he had practiced law in the county for over twenty-five years, and that, "in all his experience he had never seen a more faithful or efficient officer than the defendant. * * * (That) when witness was Commonwealth's attorney he always had the full co-operation of the defendant in the enforcement of the penal laws of the Commonwealth. (That) the defendant conscientiously enforces the prohibition as well as all other penal laws in cases brought before him."

The present Commonwealth's attorney (who did not prosecute the instant case, however, because of the accused being a relative of his, a special prosecuting attorney having for that reason been appointed by the court, who prosecuted the case in the court below), was also a witness for the accused, and testified that "no more faithful or conscientious justice could be found" than the accused; "that the defendant always co-operates with the Commonwealth's attorney in the enforcement of all penal laws of the Commonwealth, prohibition laws as well as other laws." That, "as a matter of fact, defendant was considering the case of James Robinson when the alleged violation of law by the defendant occurred, and after ascertaining to his satisfaction that the liquid found at Robinson's home was ardent spirits, sent the case on to the grand jury and the case is now pending in the Circuit Court of Brunswick county." That "witness has always observed that where the evidence warranted doing so, the defendant sends on to the grand jury cases involving violation of the prohibition laws."

Another witness for the accused testified that he had practiced at the bar of the county for a great many years, and that "the defendant is a faithful and conscientious of-

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ficer and enforces the prohibition, as well as all other penal, laws of the Commonwealth." That "the defendant is a good officer."

Another witness for the accused—the chairman of the board of supervisors for the county and a member of the State Highway Commission—testified to the same effect.

Witnesses for the accused also testified to the effect that there was no disorder in the room on the occasion above referred to.

The trial court, over the objections of the accused, gave the following instructions in writing:

"1. The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the accused gave away, or dispensed, ardent spirits, as charged in the indictment, then they must find the accused guilty.

"2. The court instructs the jury that it is unlawful for any person in this Sate to dispense or give away ardent spirits in public places, unless licensed to do so by law, and that the office of a justice of the peace during the trial of a case is a public place; and if they believe from the evidence, beyond a reasonable doubt, that the accused dispensed or gave away ardent spirits, as charged in the indictment, then they must find the accused guilty.

"3. The court instructs the jury that if they believe from the evidence that the sole object and purpose of the defendant in asking a person or persons in his office to taste, or drink of, the liquid found in the possession of James Robinson was to enable the defendant, as justice of the peace, to ascertain whether the said liquid was ardent spirits and thus enable him to arrive at a correct conclusion on the question whether the case of the said James Robinson should be sent on to the grand jury, they must find the defendant not guilty. But in ascertaining the object and purpose of the defendant in asking and permitting persons to taste or drink of the liquid in question, they shall consider all the facts and circumstances shown in evidence, including the number of persons who drank and the quantity of liquid permitted to be drunk by them."

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And the following oral instruction was given to the jury by the court, of its own motion, to which the accused objected:

"This appears to be a case of unintentional or inadvertent violation of the prohibition law; and if you find the defendant guilty, you must not impose a jail sentence, but only a fine, of not less than $50.00 nor more than $500.00."

The jury found the following verdict: "We, the jury, find the defendant guilty and fix his punishment at a fine of $50.00."

The accused, by counsel, moved the court to set aside the verdict as contrary to the law and the evidence. This motion the court overruled and entered judgment in accordance with the verdict, and the accused brings error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions raised by the assignments of error will be disposed of in their order, as stated below:

1. Was instruction No. 3 erroneous?

We are of opinion that this instruction correctly stated the law as applicable to this case.

As said in 23 Cyc. 574-5: "It is well settled that a judicial officer, when required to exercise his judgment or discretion, is not liable criminally for any error which he commits, provided he acts in good faith. But any judicial officer who acts corruptly is responsible criminally, whether he acts under the law or without the law."

As said in Bishop's New Cr. Law (8th ed.), sec. 460: "One serving in a judicial or other capacity in which he is required to exercise a judgment of his own, is not punishable for a mere error therein or a mistake of the law. His act, to be cognizable criminally, or even civilly, must be willful and corrupt."

In the opinion of the court, delivered by Judge Brockenbrough in *Jacob's Case* (which was a prosecution of justices of the peace), 2 Leigh (29 Va.), at p. 715, this is said:

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"It is a well-settled principle that a judicial officer cannot be prosecuted criminally for any judgment rendered by him, however illegal, unless rendered from some motive of malice, partiality or corruption. Much less can such a prosecution be carried on, where the act done is within the plane of his lawful authority, without such corrupt motive."

We do not mean to approve of the method resorted to by the justice in the case before us of having persons drink the liquor in order to testify as to its character. Such a proceeding is too liable to abuse. The statute law prescribes a different method for the ascertainment of such fact where it is necessary. Section 4621 of the Code provides the method of obtaining an analysis of the liquor, and that method should be resorted to where all other available existing evidence leaves the character of the liquor in question in reasonable doubt. Nevertheless, if the accused acted in the premises in the discharge of his duty as a justice of the peace, and in entire good faith, however mistakenly, he was not liable criminally, and the instruction under consideration correctly submitted the ascertainment of those facts to the jury.

2. Were instructions Nos. 1 and 2 erroneous?

This question must be answered in the affirmative. These instructions are both instructions to find the accused guilty, and are both predicated upon but a partial view of the evidence. They both ignore the uncontroverted testimony of and for the accused to the effect that he acted in his official capacity and entirely in good faith, with the sole purpose of discharging what he conceived to be his duty as a justice of the peace. Upon well-settled principles, both instructions were erroneous.

3. Was the concluding oral instruction given to the jury by the court erroneous?

This question also must be answered in the affirmative.

While doubtless intended to apply only in the event that the jury should find the accused guilty of violation of the prohibition law, and in that case would have been a per-

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fectly proper instruction under the statute, it does not clearly say so. As given, it sets out, by expressing the opinion of the trial judge that it appeared to be a case of violation of the prohibition law, albeit one of an unintentional violation of such law. This was such an invasion of the province of the jury as to constitute in itself reversible error.

The case must, therefore, be reversed, and a new trial awarded, to be had, if the case is further prosecuted, in conformity with the views above expressed.

Reversed.

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N. B.—All opinions printed in this number are subject to rehearings which may be granted under the above statute.

JUDGES

HON. JOSEPH L. KELLY, President,

HON. FREDERICK WILMER SIMS, HON. MARTIN P. BURKS.

HON. ROBERT R. PRENTIS, HON. EDWARD W. SAUNDERS.

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VIRGINIA APPEALS

ROBERTS *v.* ALEXANDRIA WATER COMPANY.

(*Richmond, January 19, 1922.*)

1. DEEDS.—Use of Water—Right to Lay Mains—Taking Water from Mill Race—Privilege or Revocable License.

Appeal from Circuit Court of city of Alexandria.

Affirmed.

Jas. R. and *H. B. Caton,* for the appellant.
Gardner L. Boothe, for the appellee.

Burks, J., absent.

PRENTIS, J.:

The complainant is the owner of a tract of land known as the Cameron farm, lying partly in Alexandria and partly in the county of Fairfax, upon which he resides. He is engaged in farming, has live stock thereon, and a number of employees. The defendant is a public service corporation which owns the water supply system with the necessary appurtenances connected with such an enterprise, which is furnishing water to the general public in and about the city of Alexandria for domestic and other purposes. Reuben Roberts and Robert F. Roberts and their respective wives, predecessors in title of the complainant, by deed dated May 1, 1851, conveyed to the company a certain mill with its appurtenances, known as one of the "Cameron Mills," in Fairfax county, together with certain water rights and water privileges belonging thereto, and the use of certain other

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land which might be required for necessary houses for the protection of its machinery, etc., all of which is particularly and carefully described in the conveyance.

The company, the grantee in the deed just referred to, by deed dated May 2, 1851, conveyed to the said Reuben Roberts and Robert F. Roberts the right and privilege of using the water in the mill race belonging to Cameron mill, in Fairfax county, for all farming purposes of the Cameron farm (excepting irrigation), also the full and free use and enjoyment of such surplus water in the mill race as might not at any time be required by the company to propel its machinery for the purpose of conducting water to the town of Alexandria in accordance with its charter; such grant was not, however, to be construed to limit the company in the use of such water, or the raising of such quantities thereof as might be necessary for the future use of the company to any attainable elevation. The grantees in this deed covenanted that in the use of such water they would not commit any act, matter or thing by which the water in the mill race should become impure or unfit for use by the company for its purposes. There was a further provision that the expense of repairing the mill race should be borne equally by the parties; provided, however, that the grantees should not be required to contribute to or pay for any repairs which might be required after they had released or reconveyed to the company the right to the use of the surplus water granted by the deed.

Thereafter, September 27, 1851, the same Reuben Roberts and Robert F. Roberts, in consideration of $5.00, granted to the company, which was then engaged in the construction of its works, and more particularly in the location of its main pipes, conduits and fixtures, the privilege of passing its mains and pipes through certain portions of the land of the grantors, particularly described in the deed, reserving to the grantors the *fee simple* ownership and the use and enjoyment of the land along the line of the

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location of the pipes, in any manner not inconsistent with the uses and privileges granted.

The company constructed its plant and has been operating it for many years. The then owners of the Cameron farm and their successors in title down to the complainant, appear never to have taken the water directly from the mill race in accordance with the provisions of the deed of May 2, 1851, from the company. Instead thereof, fifty years or more ago they were allowed to tap the watermain of the company, and by means of a connecting pipe have supplied themselves with water on the Cameron farm for domestic and farm purposes.

In 1919, the State Corporation Commission of Virginia required the company to install a filtration plant and a plant to treat with chemicals the water furnished to its patrons, because of the fact that the water had become unpotable.

The point on the main tapped by the predecessors of the complainant is located between the water supply and the plant so erected for the filtration, purification and chemical treatment of the water, so that the water received by the complainant is described as "raw," "untreated" water, which is regarded as unfit for drinking purposes, certainly during certain parts of the year. On July 29, 1919, after the installation of the filtration plant, the company was notified by the State Board of Health to discontinue the furnishing of unfiltered water to consumers because unless properly treated it was unsafe for domestic use, and in consequence of such notice the complainant was advised that the pipe connection by which unfiltered and untreated water was carried for his domestic and farm uses would be discontinued. Thereupon, the complainant filed his bill, the object of which was to enjoin the company from breaking such connection. At the final hearing, the trial court dissolved the interlocutory injunction which had been theretofore awarded and dismissed the complainant's bill, from which decree this appeal has been allowed.

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It is not necessary in this case to consider or determine the powers of the State Board of Health in the premises, this being a suit to which that board is not a party, and because it is unnecessary, as the rights of the parties, in our opinion, are manifest without any reference to the validity of the order of that board. The question raised requires the construction of the deeds to which reference has been made, with such aid as can be derived from the attending circumstances and conduct of the parties interested.

The deed upon which the complainant must and does rely for the support of his contentions is that dated May 2, 1851, from the Alexandria Water Company to Reuben Roberts and Robert F. Roberts. So much of its language as it is necessary to recite follows:

"* * * the said party of the first part, in consideration of one dollar, *do* grant unto the said parties of the second part the right and privilege of using the water in the mill race belonging to the Cameron Mills, in Fairfax county, Va., for all the farming purposes of the so-called Cameron farm (excepting irrigation). Also the full and free use and enjoyment of such surplus water in said mill race as may not at any time be required by said Alexandria Water Company to propel its machinery for the purpose of conducting water into the town of Alexandria in accordance with the act of the General Assembly of Virginia incorporating the said company, but this grant shall not be construed to limit the said Alexandria Water Company in the use of said water, or of raising such quantities thereof as may be necessary for the present and future use of said company to any attainable elevation." Then follow carefully drawn provisions designed to maintain the purity of the water in the mill race and for repairs. It is observed that on the previous day the grantees in this deed had conveyed the mill property and its appurtenances, together with all the water rights and water privileges appertain-

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ing thereto to the company. Each deed appears to be carefully drawn and designed to express definitely the true intent and agreement of the parties thereto. Later in the year, September 27, 1851, the same Reuben Roberts and Robert F. Roberts conveyed to the company the right to lay their pipes and mains upon other property, with careful description and provisions for the protection of their mutual rights; among other provisions, requiring the pipe to be laid at least four feet below the surface of the earth, and reserving the *fee simple* to the grantors, with the right to cultivate all of the land.

It is claimed that all of these deeds should be construed together as parts of a continuous and closely connected transaction, and that the tapping of the watermain, under the circumstances heretofore stated, constitutes a construction of the deed of May 2, 1851, by the parties themselves, and irrevocably establishes the complainant's right to maintain such connections. In a certain sense, it is true that the various conveyances are connected with each other, as they all relate to the property rights of the same parties, and to the establishment and operation of the plant of the company; that is, they were all promotive of that general purpose. Each conveyance, however, as has been indicated, was carefully drawn and is complete in itself, hence it is not perceived how connecting them with each other in any way aids or supports the complainant's claim. The first deed is a simple conveyance of the mill and property rights; the second grants to the then owners of the property the right to use the water in the mill race for the purposes indicated, the source of supply being explicitly designated three times in the deed—first, when the right to the use of the water therein for farming purposes is granted; again when the use of such surplus water "in said mill race" as might not be required by the company is granted, and still again when there is reference to the possible pollution of the water. In each instance, both the location and source of the

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supply are designated as the water in the mill race. Then when we come to the third deed in the sequence, that of September 27, 1851, we find nothing whatever with reference to any use of the water by the grantors, but this conveyance merely grants the company the right to lay mains in certain other locations on the farm, and only reserves to the grantors the rights not inconsistent therewith. It seems to us that if this deed was intended to add to or to modify either of the previous conveyances, such intention would certainly have been expressed therein by appropriate language. So that the complainant's rights depend upon whether or not, to his clear right under the deed of May 2, 1851, to use the water in the mill race, there has in any way been superadded the right to tap the mains of the company elsewhere and to maintain such connection indefinitely. To state this proposition is to indicate the only proper solution of the question raised. The language which grants the right to take water from the mill race is simple, clear and definite, needs no interpretation, and clearly cannot be construed to grant the right to take the water directly from the watermain at a point some distance away from the mill race.

The learned counsel for the complainant cites many authorities to establish the unquestioned legal doctrines upon which he relies, but we do not deem it necessary to discuss them because, in our view, they do not aid in the determination of the question here presented. If there had ever been any contract for such a connection, doubtless it would be fully protected, and if the language used in the deeds to be construed was doubtful in meaning, the rules governing in such cases would be applicable. The rules for the interpretation of ambiguous contracts cannot, however, be applied to instruments like these, which, as to the right here involved, are unambiguous.

We find no support in the evidence for the contention that the parties have themselves construed the contract relied on

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as giving the complainant the legal right to maintain the connection, and to sustain it would do violence to that rule which can only be applied to the construction of contracts where the language used is of doubtful import. It cannot be extended for the purpose of establishing a new and different contract from that which is proved. When such a new and different contract is relied on, it must be proved like any other essential fact.

It is proper to note that, covering a period of many years previous to the acquisition of the property by the complainant, his predecessors in title were connected with the company, one of them as president and two others as directors, and this is doubtless the explanation of the fact that the company permitted the connection with its main to be made. There is, however, no scintilla of evidence indicating that it was thereby intended to construe or modify the contract to take water directly from the mill race, that it was by way of substitution for that right, or that it was anyhing more than a bare privilege or revocable license.

Under the evidence in this case, the decree of the court dismissing the bill is justified.

Affirmed.

STEVENSON v. SPIVEY.

(*Richmond, January 19, 1922.*)

1. DEEDS.—Restrictions—Building Line—General Scheme of Development—Intention of Grantor—Subsequent Grantees.

Appeal from Hustings Court of city of Portsmouth.

Affirmed.

Mann & Tyler, for the appellant.

J. Edward Cole, for the appellee.

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KELLY, P.:

This is an injunction suit brought by Stevenson against Spivey to restrain the latter from violating a building restriction contained in a deed from one of his remote grantors. The decree appealed from denied the relief prayed for, and Stevenson assigns error.

By deed dated June 12, 1901, the Port Norfolk Land Company conveyed to one T. V. Owens a certain lot designated, on one of that company's recorded plats, as No. 443. Immediately following the granting clause and the covenants of title, the deed contained this sentence: "No building to be erected within twenty-five (25) feet of the front line of said lot." By three successive mesne conveyances, the last of which was dated July 13, 1914, this lot passed to and became the property of the defendant, Spivey. Neither of the intermediate conveyances contained any building restriction whatever, or any reference to any such restriction in the first deed.

By deed of May 11, 1905, the said Port Norfolk Land Company conveyed to complainant, James T. Stevenson, lot No. 445, as designated on the plat aforesaid. This deed contained the same building restriction which was embodied in the conveyance from the land company to Stevenson, to-wit: "No building to be erected within twenty-five (25) feet of the front line of said lot."

Lots 443 and 445 each has a frontage of forty feet on Maryland Avenue, and each runs back between parallel lines a depth of 140 feet. Between these two lots is lot 444, fronting on the same street, being of the same size and dimensions as each of the other two; and immediately adjacent to lot 445 on the other side is lot 446 of like frontage, size and dimensions. Lot 444 is owned by Spivey, and lot 446 by Stevenson. Lot 444, acquired by Spivey in the same deed with lot 443, was conveyed to Spivey's predecessor in title by the Port Norfolk Land Company without any building restriction, and no such restriction appeared in any subse-

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quent conveyance thereto. Lot 446, owned by Stevenson, was originally conveyed to one of his predecessors in title without restriction.

Stevenson resides on lot 445, Spivey's intervening lot 444 is vacant, and he resides on lot 443, whereon he has a combined dwelling and storehouse, and he is now proposing to extend the front of his storehouse practically up to the front line of the lot. This will contravene the terms of the building restriction in the original deed from the land company and entitles the complainant to an injunction, provided the defendant is bound by that restriction. *Spilling* v. *Hutcheson,* 111 Va. 179, 4 Va. App. 227.

The first proposition advanced by the appellant, and the one chiefly relied upon here as a ground for a reversal of the decree of the lower court, is that the restriction in the deed from the land company to Owens was inserted in conformity with and as a part of the execution of a general plan for the development of a certain known and well-defined part of the property of which lot 443 was a part, this general scheme being intended for the benefit of all the lots in that territory, those sold as well as those retained by the company, and that, therefore, the covenant or restriction runs with the land and binds the lot owned by Spivey, even though the subsequent deeds through which he derived title contained no such restriction. With the understanding that this contention distinctly embraces the idea of an intention to mutually benefit by the general scheme alleged, the lots sold as well as those retained by the grantor, and that this intention actuated both the grantor and the grantee, the legal proposition here relied upon by the appellant is well settled, was expressly recognized and approved by the lower court, and is not challenged by the appellee. 2 Min. Real Prop., sec. 1119, p. 1215; Graves' Notes on Real Prop., sec. 262, and note; 5 Am. & Eng. Ency. L. (2d ed.), p. 13; *Korn* v. *Campbell,* 192 N. Y. 490, 37 L. R. A. (N. S.) 1, 3; Note 37 L. R. A. (N. S.) 12, 27. In these authorities and in the numberless others therein cited will be found a

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full treatment of the reasons underlying the doctrine, and many learned discussions of the subject, involving much nicety of distinction in individual cases. It would be vain to undertake to review these authorities. The general principles applicable to this case are settled, and we content ourselves by the mere ctiation of some of the leading authorities on the subject. The sole point of controversy upon this branch of the case is whether the complainant has borne the burden of establishing by satisfactory and sufficient evidence the fact that the restriction in the original deed for lot 443 was inserted therein as a part of the alleged general plan.

The evidence is quite voluminous, and a detailed recital of it would be cumbersome and unprofitable. The learned judge of the lower court, as appears from his written opinion, gave a patient and laborious consideration to the testimony of the witnesses, and to the deeds, plats and other documentary evidence throwing light on the question of the existence of the alleged general plan, and reached the conclusion that the proof was insufficient to establish the contention of the complainant with respect thereto. In this conclusion we concur.

Courts of equity will enforce restrictive covenants in conveyances of real estate where the intention of the parties is clear in creating them, and the restrictions are reasonable. But they are not favored, and will not be aided or extended by implication. See *Hutchinson* v. *Ulrich*, 145 Ind. 336, 21 L. R. A. 391, 11 Cyc. 1077 compare *Virginian Ry. Co.* v. *Avis*, 124 Va. 711, 718, 17 Va. App. 550. The burden rests upon the person relying on such a covenant to bring himself within its terms. These principles apply with especial force to persons who are not parties to the instrument containing the restriction. 5 Am. & Eng. Ency. L. (2d Ed.), p. 11; *Hemsley* v. *Marlborough House Co.*, 67 N. J. Eq. 164, 50 Atl. 14; *McNichol* v. *Townsend*, 73 N. J. Eq. 276, 67 Atl. 938; *Lowell Inst., etc.*, v. *Lowell*, 153 Mass. 530, 27 N. E. 518, and (by analogy) *People's Pleasure Park Co.* v. *Rohleder*, 109 Va. 439, 445.

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In order for the restriction to operate as between subsequent grantees of different adjacent lots or parcels of the same original tract, it must appear from the instrument expressly, or by a fair interpretation thereof, that it was inserted for that purpose; otherwise it will be assumed that it was intended by the parties to the original deed to inure only to the benefit of the grantor, or his heirs and assigns *Jewell* v. *Lee,* 14 Allen 145, 92 Am. Dec. 744.

The natural method for a land owner to follow in establishing and evidencing such a general building scheme as is relied upon in this case is to make some clear and definite record thereof by indorsement on the plat, or by indicating a building line thereon, or by express recognition and provision in the several deeds to the purchasers. In the note, *supra,* 37 L. R. A. (N. S.), at page 30, the author, in dealing with the existence and effect of a general building plan or scheme adopted by a land owner in subdividing and selling land, says:

"In considering the effect of the existence of a building plan or general scheme of development upon the rights of the parties, it must be borne in mind that the problem presented is: What was the intention of the parties? This is ascertained by the evidence presented. The plan or scheme furnishes evidence of this intention. As was said by Collins, L. J., in an English case: 'Where a vendor sells land and retains other land, and imposes on the purchaser a covenant, it becomes a question of fact what the effect of that covenant is. That being a question of fact, it must be decided in the light of the evidence, as are all other questions of fact. But if you find that a building scheme exists, proof of that building scheme may be given. It is only a matter of evidence, and it is perfectly competent to prove by other evidence, if you can find it, whether or not the building scheme applies. So, it has been held that it is not necessary that there should have been a general plan in order to make such agreements enforceable between subsequent grantees. The court said that it is not because a plan is deranged that

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the court interferes, but because rights are invaded, or about to be; and this fact may exist in the plan of two lots as well as in one of two hundred. The plan often furnishes the proof of the terms on which the sales were made; but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan.

"The plan furnishes a very strong inference that it was the intention to make the restrictions specified mutually binding on each purchaser of a lot in the plot included therein, but it is not necessarily conclusive. If, from all the evidence—the map, the advertisements, the covenants in the deeds themselves—the uniform scheme of development or improvement is proved to have been the intention of the parties, equity will carry it out at the suit of any of the lot holders; provided, of course, he has not by his own conduct shut the doors of the court."

It is to be distinctly noted that the mere adoption and existence of a general practice or custom, whereby the owner includes in each of his conveyances for lots a uniform building restriction, is not in itself and alone sufficient to give the various vendees the right to enforce the restrictive covenant *inter sese*. That will depend upon the intention of the grantor, and there must be affirmative and preponderating evidence, either by express provisions of the deeds, indorsement on the plat, or satisfactory proof, to show that the purpose of the plan was to establish a mutuality of covenant based upon a contemplated mutual benefit, and not merely a personal covenant with the grantor to be enforced or waived by him according to his interest or pleasure.

In the instant case it appears that the lots owned respectively by the appellant and appellee were parts of a large boundary of land formerly owned by the Port Norfolk Land Company, and subdivided and sold by that company to various purchasers in accordance with duly recorded plats. It does not appear that the land company by any corporate action ever fixed upon a definite and uniform building scheme, nor is anything of that sort indicated upon either

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of the two plats which it recorded, and there is nothing in any of the deeds to the separate lots to suggest that the building restriction was intended otherwise than for the benefit of the grantor. There is, to be sure, much respectable testimony, particularly that of an attorney for the company and that of one of the real estate agents who sold many of the lots, tending to show that the company's policy, especially with reference to lots in the part of the plat in which appellant's lots are situated, was to establish a twenty-five foot building line for the mutual benefit of the company and the purchasers. This testimony, however, as pointed out by the judge of the trial court, was largely based upon opinion and belief, and it is counterbalanced, if not outweighed, by the fact that the plat showed no plan or purpose to favor one section of the entire property over another, that the company has at all times and at will sold lots in either part of its plat without any restrictions, and that nothing in the deeds containing the restrictions indicates any purpose to make the covenant run with the land, or operate in favor of any person except the grantor. It is true that in the portion of the property in which the appellant's lots are situated, a very decided majority of deeds from the company contain the building restriction in question, that this territory is largely devoted to residential purposes, and that the building line has generally been observed in the erection of residences. But it is equally true that in all parts of the plat, including that in the near vicinity of the appellant's property, some residences and other structures have been erected within a distance of less than 25 feet of the front line of the lots, and that the company has apparently at all times omitted the restriction in accordance with its own purposes and pleasure.

Miss Mildred Robinson, a deputy clerk in the office in which the plats and deeds covering this property are recorded, was introduced as a witness on behalf of the appellee and testified that she had made an examination of all the conveyances from the Port Norfolk Land Companv

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from the time it was organized to the first of October, 1919, and that as a result of her examination she found that the company had conveyed 819 lots without building restriction, as against 802 conveyed with restriction. The judge of the corporation court made a careful analysis of her testimony in comparison with the plat, she not having paid any attention to the location of the lots but having based her report merely upon the conveyances, and while we recognize and agree to a certain extent with the contention made by counsel for appellee that some of the conveyances by the land company without restriction should not be regarded as in necessary conflict with the building scheme relied upon, we are entirely satisfied that in the result the trial court was right in holding that the company's dealing with its property has been inconsistent with and repels the claim that there was ever such a general scheme on the part of the company as would entitle the complainant to enforce the covenant or restriction in the Owens deed against the appellee.

Counsel for appellee point out that "all the lots in which the company failed to include the restriction which are anywhere near the lots of the petitioner and defendant were conveyed by the company *after* the deed to your complainant, and were practically all conveyed in five deeds," and it is claimed that the trial court held that the land company by these subsequent conveyances could defeat rights previously acquired by the appellant. This was not the effect of the holding of the trial court. The five deeds referred to were made very shortly after the deed to the complainant, some of them not more than five days thereafter, and the effect of the holding of the court was, not that this subsequent act of the company defeated any previously quired right of the appellant, but that it showed a course of conduct inconsistent with the existence of such a general scheme as is relied upon by the appellant. We may well conclude the discussion of this branch of the case by the following excerpt from the written opinion of the trial

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court, to-wit: "Speaking more particularly of the block on Maryland avenue which includes the lots of plaintiff and defendant, and having reference to the list and plat aforesaid, it may be said that of the fifteen lots in said block twelve were conveyed without the restriction and only three with it, viz: Lots 443 and 445 belonging to defendant and plaintiff, respectively, and 455 to some third party, and it is worthy of note that lot 444 lying between lots 443 and 445 is one of the lots conveyed without restriction."

The remaining contention of the appellant is that, even if the evidence fails to establish the general plan alleged, as he "was a subsequent purchaser from the land company of an adjacent lot, he was entitled to enforce the restriction as against a grantee from a prior purchaser whose recorded deed contained the same restriction."

This contention must be rejected for reasons already indicated. As previously stated, the appellant's lot does not adjoin the lot upon which the appellee proposes to extend his building. If, however, the lots were adjacent, the proof of the general plan here relied on having failed, neither of the grantees could enforce the restriction as against the other. *Jewell* v. *Lee, supra.*

For the reasons stated the decree complained of must be affirmed.

Affirmed.

THOMAS WALKER AND CAIN WALKER *v.* COMMONWEALTH.

(*Richmond, January 19, 1922.*)

1. INTOXICATING LIQUOR.—Manufacture—Evidence.

Error to Circuit Court of Charlotte county.

Affirmed.

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Hutcheson & Early, for the plaintiffs in error.

Attorney General John R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

PRENTIS, J.:

Thomas Walker and Cain Walker were separately indicted and were each convicted of the illegal manufacture of ardent spirits upon identical testimony, and the cases can be disposed of here by one opinion.

The only assignment of error is that the verdict is contrary to the evidence.

The evidence for the Commonwealth shows that three officers had been sent to investigate rumors that there was a still in the neighborhood of Red Oak, in Charlotte county. In their search they came to a point on a hillside from which they could look down on a small clearing about forty yards away. In this clearing they saw a large number of barrels and three colored men going from barrel to barrel and looking into them as if examining their contents. They clearly and positively identified Thomas Walker and Cain Walker as two of these men. After a few minutes all three of the colored men left and the officers then went down to the clearing and found twenty-seven barrels containing mash, or beer, which contains alcohol, will produce intoxication, and which is commonly used in the manufacture of corn whiskey. Two of the officers hid among the barrels, after first moving one barrel so as to cover a gap through which they might be seen by any one approaching on the path by which the colored men had left. The third officer went a short distance away and hid in the bushes. About half an hour later, the defendants came down the path by which they had shortly before left, and just before they reached the barrels one of them said, "Somebody has moved this barrel." The officers then disclosed themselves and arrested them. All the parts of a still were found concealed in the bushes at another clearing about a quarter of a mile away, and about sixty yards from a negro dwelling to which

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the officers took the prisoners at their request, so that they might notify their families of their arrest. It developed afterwards that this dwelling was not the home of the defendants.

Both of the accused denied having been at the place where the mash was discovered prior to their arrest, and Thomas Walker stated that he was at the house above referred to, to get his mother-in-law to nurse and look after his wife who was about to be confined; that there he met Cain Walker and started back with him, and on their way looked up the path from a point where two paths joined and saw some barrels, and that he and Cain Walker went up this path merely as a matter of curiosity and while thus engaged they were arrested. It appears, however, from the testimony of the Commonwealth's witnesses that because of the intervening bushes it would have been impossible for him to see the barrels from the point at which he testified he saw them. Cain Walker undertook to explain his presence by saying that he had been out looking for a stray mule. The path referred to terminated at the barrels, was well beaten and showed constant use. These defendants were fully identifiend by the witnesses for the Commonwealth, and the trial jury heard and considered their testimony in denial of the natural inferences to be derived from their presence, knowledge of, and apparent interest in, care of and attention to the barrels containing the mash from which whiskey was to be manufactured at that place.

Under Code 1919, section 6363, this court is inhibited from setting aside a verdict approved by the trial court unless it appears from the evidence that such judgment is plainly wrong and without evidence to support it. To reverse these convictions would be to disregard this statute.

Affirmed.

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J. LEON WOOD & CO., *v.* ARONBERG.

(Richmond, January 19, 1922.)

1. BROKERS.—Sale of Stocks on Margin—Call for Additional Margins—Principal and Agent—Purchase for Another's Account—Right to Require Transfer Evidence—Verdict.

Error to Circuit Court of city of Norfolk.

Reversed.

E. A. Bilisoly, Geo. S. Martin and *R. W. Shultice,* for the plaintiffs in error.

Williams, Loyall & Tunstall, for the defendant in error.

BURKS, J., absent.

PRENTIS, J.:

D. G. Aronberg instituted his motion for judgment against J. Leon Wood and J. W. Cole, partners doing business as J. Leon Wood & Co. There was a trial by jury and a verdict for the defendants; whereupon the plaintiff made a motion to set aside the verdict upon the ground that it was contrary to the law and the evidence, which motion was sustained; thereupon the trial judge entered judgment in favor of the plaintiff against the defendants for the full amount claimed, $5,439.18, and they are here assigning error.

The pertinent facts out of which this controversy arises may be thus stated: One R. Palmer Ingram had been buying stocks upon margins through the defendants, who were stock brokers, for several months. On the 24th day of June, 1919, he bought through them 200 shares of stock of the American Sugar Refining Co. at 134 1-2. The margin required on this transaction was $2,000. Ingram gave the brokers his check for $1500 instead of for the amount demanded, because, as he roughly figured up his account, he found that he had $500 or $600 to his credit over and above the sum necessary to margin various other stocks which he

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was then carrying with the defendants. The 200 shares of stock were purchased in his own name, and according to the testimony of the defendants nothing was said then, nor until a long time thereafter, about the plaintiff, Aronberg, and no intimation was then given that he had any interest in the transaction. Ingram's cancelled check for $1500 now has on it a notation "for D. G. Aronberg," but the brokers testify that they believe that this was not put on the check until after it had been paid. Confirmation of the purchase was duly made to Ingram, showing that the stock had been bought for him. There was a subsequent check for $500 containing the same notation paid by Ingram to the brokers for additional margin on his account. Before this particular transaction Ingram had bought 50 shares of this stock, and after it he also bought 100 shares of it in the same way on margin in his own name. On the 7th day of August, 1919, Ingram owed the brokers, Wood & Co., over $3,000 on account of margins due on purchases of these and various other stocks. It appears from the plaintiff's testimony, though the defendants deny that they had any notice of this, that Aronberg, the plaintiff, who was absent from the city a great deal, had directed Ingram to buy 200 shares of this particular stock for him, and at the same time authorized Ingram to get the $2,000 which was necessary to pay the margin from his (Aronberg's) office. Aronberg, however, paid no attention to the fact that he had no confirmation of the sale from the brokers, or that the stock was being carried in Ingram's name as purchaser and owner. Between July 17 and August 7, 1919, the brokers were pressing Ingram for additional margins, and threatening to close out his account unless the additional funds were supplied. Ingram then owed the brokers more than $3,000 for margins then due on this and other stocks being carried for him, and on August 7, 1919, this letter was sent to the brokers by special messenger:

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"Norfolk, Virginia, August 7th, 1919.

"Messrs. J. Leon Wood & Co.,

"City.

"Gentlemen:

"Enclosed please find my check for $2,000 as additional margin to cover 200 shares of American Sugar, now held in the name of Robert P. Ingram, also kindly transfer same to my account.

Yours very truly,

"D. G. Aronberg."

Upon receipt of this check the brokers immediately had it certified and placed to the credit of Ingram's account. This letter was dictated by Ingram but signed by Aronberg. The brokers promptly and positively refused to transfer the 200 shares of stock because the amount was insufficient to margin the stocks then being carried for Ingram by them and replied to this letter on August 8th in this language:

"We have your favor of the 7th, enclosing check for $2,000 and have placed the same to the credit of the account of Mr. R. Palmer Ingram."

When the plaintiff and Ingram learned that the brokers declined to transfer the stock to Aronberg, Ingram wrote a letter, signing Aronberg's name to it, to the effect that inasmuch as they had not carried out the instructions, he had stopped payment of the check, but as the check had already been certified, this effort to stop its payment was unavailing. From that time to the close of the transactions there appears to have been no change in the relation of the parties. Both plaintiff and Ingram then knew that the $2,000 had been placed to the credit of Ingram's account, and that the defendants refused to transfer the 200 shares of sugar to Aronberg because of Ingram's failure to pay the additional margins required. The brokers continued their demand on Ingram for additional margins, and on September 23, 1919, notified him by letter that unless he deposited at least $3,000 by Thursday, September 25, they would close

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out his account at the prevailing prices, and also advised him that he was then carrying with them 50 shares of Pierce Oil, 200 shares of American Sugar Refining Co., and 100 shares of Silver King of Arizona. The letter further states that "Unless this matter is attended to by eleven o'clock on the morning of Thursday, September 25th, we will sell these securities at the market the best we can get at that time." On September 25, according to the testimony of the brokers, Ingram told them to close out all of these stocks, and thereupon, on that date, they were sold, and after crediting the proceeds of sale the account showed a balance of $478.50 due to the brokers.

Thereafter, on the 30th day of September, Aronberg and Ingram went to the office of the defendants, after they both knew that the stock had been sold, and Aronberg demanded his money, asking for $4,000, or as he expressed it, "very particularly, where is the $2,000 check I sent you. I have an account or I didn't have an account. If I did have an account and you accepted my check my account is still in force and I will tell you when to sell the sugar." But the brokers declined to respond to his demand. Then on October 2, 1919, Aronberg wrote the brokers this letter:

"Referring to my letter of August 7, 1919, in which I enclosed my check for $2,000, as additional margin to cover 200 shares of American sugar stock, then held in the name of Robert P. Ingram, with instructions for the transfer of this stock to my name, I now instruct you to sell the same at the market price and ask that you kindly let me have remittance to cover this transaction."

To this letter no reply was made, and this litigation ensued. The judgment of the trial court is based upon the view that the plaintiff was entitled to recover as the original purchaser of the 200 shares of stock at 134 1-2 and to receive the profit which would have been his if the whole transaction had been in his name as purchaser from the beginning, and terminated by a sale of the stock as his property by his directioin at the prevailing price on October

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2, 1919, the date of this letter—that is, at 142. Thus calculated, his profits would correspond with the judgment of the court.

The solution of the controversy depends upon whether or not, under these circumstances, the court erred in setting aside the verdict of the jury which was in favor of the defendants. In this connection it should be observed that the letter of August 7, enclosing the $2,000 check of Aronberg was nct accompanied by an order from Ingram directing the brokers to transfer the stock to Aronberg, nor does the letter disclose upon what terms and conditions the stock was to be transferred from Ingram's account and its ownership changed. It seems clear from Aronberg's claim in this proceeding that he then intended that it should be transferred to him with a credit of $4,000 and charged at the original purchase price of $134.50 per share, because had he intended it as a new transaction as of that date, he could have bought it then as a new transaction at $127 per share upon a margin of $2,000. If his view is to prevail here, and he is to be held to be the original purchaser of the stock as of June 24, the effect of accepting his construction is to take away $400 or $500 of margin or credit which, if the evidence of the brokers is true, belonged to Ingram, that being the amount then to his credit on that particular 200 shares of stock if segregated from all of his other transactions. It may be assumed from Ingram's action that he was willing, indeed anxious, to have the transfer made, though it does not appear even from his own testimony upon what terms he desired the stock to be transferred to Aronberg, and certainly he had no right to insist upon the transfer under the circumstances detailed until he had supplied the funds necessary to margin his account.

On the 8th of August, 1919, both Aronberg and Ingram ascertained definitely from the brokers that the transfer would not be made until the account was properly margined.

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The inferences to be drawn from these facts and circumstances and the consequential legal rights of the parties are difficult to determine. It is observed, however, that Aronberg, the plaintiff, took no other action and made no other protest whatever; indeed, he is not heard from in connection with the matter from that date, August 8, until September 30, after the brokers had, with Ingram's knowledge, sold the stock as his property and for his credit. Clearly, unless he was a partner of Ingram, or his principal, in all of Ingram's transactions (of which there is some suggestion in the testimony), Aronberg, when he learned that the brokers refused to make the transfer which he desired, had the right to demand and recover the $2,000 which he paid them. He made no such demand, however, until September 30, after he knew that the account had been closed. It may be that the jury inferred from this, either that he accepted the brokers' construction of his letter of August 8, or else that he waived his rights in the hope that the stock market would so improve that the transaction would nevertheless prove profitable to him. He certainly had no right to lie in wait, keep silent when he should have spoken, and withhold his claim from the brokers until they had closed Ingram's account, and thus reserve his freedom to determine whether he would demand the return of the $2,000 or claim the profits upon this particular stock, and this without assuming any responsibility whatever for the losses which might arise from the transaction.

The defendants filed a special plea of set-off, alleging that Aronberg and Ingram were partners, and hence they claimed of Aronberg the balance shown to be due them on the Ingram account of $478.50. The verdict of the jury having failed to allow this claim, must be construed to determine this contention against the brokers. Although this is a necessary inference from the verdict, it is also a fair inference therefrom that they concluded from all of the circumstances of the case that Aronberg was speculating either in the stock here immediately involved, or in all of the other stocks held in Ingram's name, as an undisclosed

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principal, with the intent to take the profits arising therefrom without assuming responsibility for any of the losses

Upon the whole testimony we must determine whether or not it was sufficient to support the verdict of the jury in favor of the brokers, for if it was the court erred in setting it aside.

The rule upon this subject has been recently stated in *Palmer* v. *Showalter*, 126 Va. 306, 19 Va. App. 332, 101 S. E. 136, thus: This court "will sustain a verdict, although it was set aside by the trial judge, unless it can be perceived that there has been a plain deviation from right and justice, and that the jury have found a verdict against the law, or against the evidence."

The conclusion from typical Virginia cases, to which many others could be added is thus expressed in *Forbes & Co.* v. *Southern Cotton Oil Co.*, 130 Va. , 23 Va. App. 486, 108 S. E. 15: "They manifest the great respect that is accorded the verdict of a jury fairly rendered. It is not sufficient that the judge, if on the jury, would have rendered a different verdict. It is not sufficient that there is a great preponderance of the evidence against it. If there is conflict of testimony on a material point, or if reasonably fair-minded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive and cannot be disturbed either by the trial court or by this court, or if improperly set aside by the trial court, it will be reinstated by this court. But with all the respect that is justly due to the verdict of a jury, and which is freely accorded to it, if there has been 'a plain deviation from right and justice' even a court of law will not make itself a party to such a wrong by entering up judgment on it. The initial step of the trial court, that of setting aside the verdict, can only be taken either where there is no evidence at all to support the verdict, or else the verdict is plainly contrary to the evidence and does not come within the rule above stated."

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Blair & Hoge v. *Wilson*, 28 Gratt. (69 Va.) 166; *Morien* v. *Norfolk & Atlantic Terminal Co.*, 102 Va. 622, 40 S. E. 907; *Jackson* v. *Wickham*, 112 Va. 128, 5 Va. App. 44. 70 S. E. 539; *Bashford* v. *Rosenbaum Hardware Co.*, 120 Va. 1, 13 Va. App. 28, 90 S. E. 625.

Applying this strict rule to the case here, we have a transaction about which there is a very sharp conflict in the testimony, but according to the evidence introduced by the defendants Ingram bought the stock in his own name, paid the necessary margin with his own money, as well as additional margins thereon from time to time thereafter, and then undertook with the plaintiff, while he was largely indebted to the brokers, to transfer all of his rights in the most valuable stock for speculative purposes which he was carrying, without responding to the proper demand of the brokers for additional margin, and that when the brokers refused to accede to his demand to make the transfer as to which he gave no definite directions, neither he nor Aronberg then raised any further question as to the right of the brokers to refuse to respond to their request. Aronberg was then silent, while Ingram assented to the sale of the stock, the legal title to which was clearly in him, and only after the transaction had been closed and the brokers had taken their loss did Aronberg again appear as a claimant. Under these circumstances, we are of opinion that the verdict of the jury in favor of the brokers is not plainly wrong, and that whatever fair difference of opinion there may be as to the correctness of their conclusion, the case presents a question which under our system was properly referred to the jury, and their verdict is conclusive.

For the reasons indicated, we are of opinion that the trial court erred in setting aside the verdict, and this court will, therefore, reverse the judgment in favor of the plaintiff and enter judgment in favor of the defendants upon the verdict of the jury so improperly set aside.

Reversed.

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PETERSBURG GAS CO. *v.* CITY OF PETERSBURG ET ALS.

(*Richmond, February 2, 1922.*)

1. PUBLIC UTILITIES.—Gas Company—Rates to be Charged—Manner of Determination—Value of Plant—Pre-War Value—Depreciation—Certification of Facts by Commission—Const., sec. 156-f—Just Compensation—Return Upon Investment—Reproduction Cost—Operating Expenses—Amortization of Losses—Regulation of Service.

Appeal from State Corporation Commission.

Remanded.

Mann & Townsend, for the appellant.

R. B. Willcox and *Chas. Hall Davis,* for the appellees.

BURKS, J.:

This is an appeal from a decision of the State Corporation Commission, fixing rates which the Petersburg Gas Company was allowed to charge to its patrons for gas. The record is not made up in the chronological order of events as they occurred before the commission (as it should have been), and it is only after searching through the record that we are able to state the case in that order.

On February 13, 1920, the gas company filed a new schedule of rates before the Corporation Commission, effective March 15, 1920, by which there was an increase in the maximum rate allowed for regular meters from $1.15 per thousand cubic feet to $1.60 per thousand cubic feet. This increase was asked in view of the increased cost of labor and materials and because the operating expenses for the year 1919 more than consumed the total income of the gas company. On June 29, 1920, the engineer of the commission filed a report in which, among other things, he stated "that the services rendered by the Petersburg Gas Company may be considered as a fair average compared with other cities in Virginia and in the eastern United States." On July 21, 1920, the said engineer filed a second report, in which he gave his estimate of the net value of

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the plant for rate-making purposes at $209,000. The gas company was contending for a valuation of $481,000, and had no information as to the filing of this second report. On August 2, 1920, the State Corporation Commission delivered an opinion based upon the second report of its engineer, fixing the maximum rate for regular meters at $1.50 per thousand cubic feet, and criticising the gas company for attempting to collect rates based on an excessive valuation of its property. The opinion also suggested a careful examination of the company's property by an expert engineer. Upon the filing of this opinion the gas company promptly asked for a valuation of its property for the purpose of rate-making by an expert engineer, and furnished the names of a number of such experts, stating that it was perfectly willing to have the valuation made by any one of those named, or any other competent expert that might be selected by the commission. The commission selected from the list thus furnished the firm of Forstall & Robison, of New York city, engineers of wide experience and very decided ability. On August 23, 1920, the commission addressed a communication to Forstall & Robison in the following language:

"In view of your employment by the Petersburg Gas Company, with the approval of the commission, for the purpose of making an inventory and appraisal of its property, so as to ascertain its fair value, this is written for the purpose of outlining the commission's views.

"It is desired to ascertain the value of the company's property on the 1st day of January, 1917, based on the average unit price of the preceding five years. This does not, of course, prevent the company from advancing any other basis of arriving at the value that it desires to present in connection with this case. In arriving at depreciation, the commission wishes, in addition to any basis used by you in determining this element, to be advised as nearly as you can do so of the age and wear of the various ele-

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ments composing the property and ascertainable as far as possible from the records and the probable age of any property that may have been bought second hand.

"To the value as of January 1, 1917, there is, of course, to be added, the purchases at cost since that date to the most recent available date, July the 1st, if practicable.

"The commission also desires the financial history of the company, in the main, as outlined on pages 4 and 5 of the paper filed today by the Young Men's Business Club and the Gas Consumers' League of Petersburg.

"We assume that report will include, as usual, a statement as to the general condition of the plant in its relation to its public service and such suggestions as may occur to you for improvement and efficiency."

Pursuant to the foregoing instruction, Mr. Forstall, of the firm of Forstall & Robison, made the valuation, based on the average unit price for the five years, 1912-1916, and ascertained the net fair valuation of the property on the pre-war basis for rate-making purposes at $405,130. At the request of the gas company, Mr. Forstall filed a second report on December 11, 1920, using the average unit price for the five years, 1915-1919, inclusive, and arrived at the depreciated value of the property, with intangibles of $620,-880. He testified that the value of the property based on the average price for the year 1920 would be twenty-five to thirty per cent higher than the figures stated in the last-mentioned report. On December 29, 1920, he filed a third report, fixing the value based on the financial history of the company in accordance with the letter of instructions of August 23, 1920, of the commission, in which he ascertained the value of the plant as of June 30, 1920, to be $453,700. Hearings were had by the commission on these various reports on January 13, 14, 27 and February 21, 1921. Pending these hearings, the gas company filed a new schedule of rates in which they asked that the rate for regular meters be raised to $2.35 per thousand cubic feet. Af-

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ter these hearings and argument by counsel, the commission rendered its opinion on March 24, 1921, in which it fixed the value of the property for rate-making purposes at $318,-350, and the rate allowed to be charged for regular meters at $1.75 per thousand cubic feet. It is from this decision that the present appeal is allowed.

The chief objections to the decision are (1) that the commission, in valuing the property of the gas company, fixed the value entirely with reference to the average pre-war unit price for the years 1912-1916, inclusive, and (2) that the commission erred in applying the depreciation of twenty-six and one-half per cent to the valuation of the gas property based upon the age of the various component parts of the plant. The commission fixed the value of the plant at $318,350, but the opinion does not show how this valuation was arrived at. There was conflict of testimony as to what portions of the real estate of the company were used, or useful, for the business of the company, and while the opinion shows that it had not accepted Mr. Forstall's report and testimony on the subject, it failed to show what portion of said real estate was not so used, or useful, or the value thereof. It also fails to state what rate of return it allowed upon the valuations fixed by it, or the rate of annual depreciation, or the fair cost of operation, facts which if found and stated would be helpful to an intelligent review of its holding. The opinion does not show, and we are unable to ascertain from it, the reasons which justified the commission in fixing $1.75 as a fair rate to be charged per thousand cubic feet.

The Constitution, section 156-f, requires the chairman of the commission to "certify to the appellate court all facts upon which the action appealed from was based, and which may be essential for a proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission, as may be selected, specified and required to be certified by any party in interest as well

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as such other evidence so introduced or considered, as the commission may deem proper to certify." It will be observed from this quotation from the Constitution that the commission is required to certify the facts above mentioned, and not merely all the evidence that was introduced before it. It was never intended that the appellate court should have to examine a large amount of conflicting testimony and ascertain therefrom the facts upon which the commission based its conclusions. The gas company insists that it applied time and again for this certificate of facts, but without avail.

Both the State and Federal Constitutions forbid the taking of private property for public use without making just compensation therefor, and the common law forbids the taking of private property of one person and giving it to another, with or without just compensation. If, therefore, the gas company is compelled to furnish its customers gas at less than "reasonable compensation," the requirement is illegal.

The subject of rate-making should be approached by commissions and courts with a view to doing what is fair and just between the parties under all the circumstances of the particular case. That for which the utility company is entitled to "just compensation" is the use of its property appropriated to the public benefit, and the value of that use is founded upon the fair value of the property so used, and not upon the amount of stock it has issued or the debts it may owe. The rate of return on such "fair value" which the utility company should be allowed to receive should be fair and just to the company and such as will make its securities attractive to investors when the company is prudently and carefully operated. "The utility is entitled to ask a fair return upon the value of that which it employs for the public convenience; but, on the other hand, the public is entitled to demand that no more be exacted from it than the services are reasonably worth." *State Public Util-*

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ities Comn. v. *Springfield Gas & Elec. Co.* (Ill.), 125 N. E. 891, 895, and cases cited. *In re Potomac Electric Power Co.* (Dist. of Col.), P. U. R. 1917D, 563, it is said that the return allowed should be one "which will be fair to the investor, who has directed his energies and devoted his substance to the creation of this instrumentality, and fair and just likewise to the consumer, who, under modern conditions, is compelled to use the product of the utility in his daily business, social and domestic life." While the utility enjoys a monopoly which it should not be permitted to use to the public detriment, at the same time it has invested its skill and capital in an enterprise that is essential to the comforts and convenience of life, and which requires large sums of money for the payment of operating charges, repairs, replacements, improvements, interest charges, taxes, sinking fund, and other purposes connected with the necessary and proper operation of its plant. These sums are to be obtained from the lending public on the faith of the security offered by the utility company. In fixing a rate, therefore, which will be just and reasonable, it must be borne in mind that the utility shall be allowed to realize such a net income upon the value or amount of its investment as will, when prudently managed, render its securities attractive to the investing public. Otherwise, there will result inferior service to the public and ultimately bankruptcy of the utility, and disaster, as well to the public as the utility.

In *Elizabethtown Gas Light Co.* v. *Public Utility Comn.*, 111 Atl. 729, in referring to an undervaluation of a gas plant, it was said: "This suffices to show that the amount of return allowed to the companies would probably be insufficient under present circumstances to *attract capital to the business, and this was one of the important tests of the justice and reasonableness of the rate as decided in the Passaic Case.*" (Italics supplied.) See also *State Public Utilities Comn.* v. *Springfield Gas & Electric Co.*, 125 N.

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E. 891; *Passaic Rate Case* (N. J.), 87 Atl. 651. The disastrous effect of failure to allow just and reasonable compensation to public service companies is well summed up by the Supreme Court of the United States in *Knoxville* v. *Water Co.*, 212 U. S. 1, 18, as follows: "Our social system rests largely upon the sanctity of private property, and that city or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer which he would obtain from a reduction in the rates charged by public service corporations is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence."

If the plant was much larger than necessary, a different question would arise as to the valuation, but it is not claimed that the plant was any larger than was necessary for the purpose for which it was used, and the duties devolved upon the State Corporation Commission in the case in judgment were (1) the ascertainment of the fair value for rate-making purposes of the property of the gas company, used or useful in furnishing gas to its patrons; (2) the fixing of the rate or per cent the gas company should receive on said fair valuation, after deducting costs of operation and any other legitimate expenses; and (3) the amount per thousand cubic feet to be paid by consumers in order to raise the necessary funds to pay all costs and expenses and the compensation to be received by the gas company. Compare *State Public Utilities Comn.* v. *Springfield Elec. Co.*, 125 N. E. 891, 902.

Several methods have been suggested as helpful in ascertaining the value of property for rate-making purposes. One of these is to take the reproduction cost, less observed depreciation. As a general rule, and where the utility has not been allowed to earn in the past a depreciation reserve greater than the observed depreciation, this seems to be the fairest method and the one best supported by authority, and as the State Corporation Commission attempted no

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other, and apparently adopted this method, in part at least, it is unnecessary to make further reference to other methods. The costs of labor and materials were greatly inflated by the world war, and have not yet receded to pre-war rates, nor is it probable that they will so recede in the near future, if ever. The result is that it has been found difficult to determine as of what date the unit of prices shall be fixed. In the letter of instructions to the engineers, the commission directed them to take the average unit price for the five years preceding January 1, 1917. Its reason therefor finds expression in the case of the *Chesapeake & Potomac Telephone Co.* (Va.), P. U. R. 1920F, 49, cited in its opinion in this case, where it was said that "it seems to the commission that a reproduction value as of normal times at pre-war prices, plus the actual sums necessarily expended during the period of inflation, less the deductions discussed above, is a fair and reasonable basis," and, so far as we can gather from the opinion of the commission, this is the basis upon which it fixed the value of the property of the gas company for the purpose of fixing the rate. It apparently refused to consider values as of any other time on the ground that they were not normal. Referring to the contention of the gas company that the value of the property should be ascertained by "using unit prices as of the time when the valuation was made," the commission said:

"This commission has, time and time again, pointed out the essential unfairness and impracticability of such a proposition. References may be made to the opinions of this commission, *In re Roanoke Water Works Co.*, P. U. R. 1920C, page 745; *Re Culpeper Telephone Co.*, P. U. R. 1920D, 305; *Re Chesapeake & Potomac Telephone Co. of Va.*, P. U. R. 1920F, page 49; Re Rosslyn Co. (not reported); *Re Bristol Gas & Electric Co.* (not reported); *Re Virginia Railway & Power Co.*, decided March 18, 1921.

"Unquestionably some recent court decisions tend to uphold the view advanced by the Petersburg Gas Company."

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After repudiating these "recent court decisions," and making lengthy quotations from the Indiana Public Service Commission in the *La Porte Case*, hereinafter mentioned. the commission says:

"We stand by the method of valuation outlined in our instructions to Forstall & Robison, believing it conforms to the standard laid down by the United States Supreme Court in the *Consolidated Gas Case*—'the reasonable value of the property at the time it is being used for the public.'

* * * *

"The commission knows, and knew when it authorized the Petersburg Gas Company to employ any one of the list of engineers submitted by it, that the firm of Forstall & Robison is entirely reputable and reliable. Any student of public utilities' reports also knows that, in addition to the entirely trustworthy reports of physical values made by engineering firms, the engineers invariably advanced theories as to additional values. Such student also knows that in most cases the engineering theories are materially reduced by commissions in accordance with their conception of reasonable values, taking into consideration, as laid down in the master case of *Smyth* v. *Ames*, 'all the elements.'

"There is also room for exercise of judgment in the degree of accrued depreciation to be deducted from the rate base.

"Under the circumstances, the commission adheres to its opinion that the reproduction cost theory applied at the time the property is being used in the public service does not reasonably mean that unit prices as of that date must be accepted. A valuation made today would show lower figures than the valuation made June 30, last. However much it might suit the engineers, it would be destructive of every theory of regulation if the utilities, the public and commissions were forced to keep on having new reproduction cost valuations with each change in unit prices.

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"So we say that if the present trend of court decisions is to be taken as requiring the ascertainment of reproduction costs as of the particular date on which the calculation is made, the entire reproduction theory must go into the discard and be succeeded by the historical method with all of its obvious defects.

"It is evident that in this case there should be some deduction from Forstall's figures of land values covering property in use or useful to the public; further, that paving over street mains must be deducted, and also value of property turned over to the Interstate Appliance Corporation, together with most of the value of the trestle. Under all the circumstances surrounding the history of this company, ten per cent of the construction value is sufficient allowance for overheads, including engineering, supervision, legal expenses during construction, taxes, interest and insurance during construction. Materials and supplies, with working capital, must, of course, be allowed in accordance with the experience of the company. A fair deduction for accrued depreciation on the physical property would, it seems to the commission, with all the light before it, be 26.5 per cent. Going value is given its due weight.

"We thus arrive at a fair valuation of the property of the Petersburg Gas Company for rate-making purposes, as of June 30, 1920, at three hundred and eighteen thousand three hundred and fifty ($318,350) dollars."

Even if we concede the premises, we are unable to draw the conclusion stated in the last paragraph. The value of the real estate used or useful in the operation of the plant is universally conceded to be not subject to any reductions, but the value thereof is not stated. The amount estimated for paving over streets and the value of the property turned over to the Interstate Appliance Company had already been deducted from Forstall's statement, and the depreciation on the different portions of the physical property was most probably not the same, and we have no means of knowing

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on what sum the 26.5 per cent of depreciation was calculated. The opinion does not state the facts upon which its calculation is based. Hence, it *does not thus appear* that $318,350 is a fair valuation. The commission apparently adopted substantially Forstall's pre-war unit valuation of $504,130, except as to the real estate, but it differed from him, as did its engineer, Dickerman, as to the amount to be deducted for depreciation. If, however, we take twenty-six and one-half per cent off of Forstall's valuation ($132,-594), we would have left $371,536, and not $318,350, fixed by the commission. It is impossible to tell from the record how the commission arrived at its valuation. In the absence of the facts required by the Constitution to be stated, we cannot presume *prima facie* that the findings of the commission are correct. As said in the *Springfield Case, supra,* "Where it appears from the finding of the commission that only a certain proportion of the actual value of the whole, or any considerable part of the property of the utility, is to be taken into consideration, then such value must be stated by the commission, or the proportion considered must be stated; otherwise, this court will be helpless in an effort to review the reasonableness of the commission's finding and order."

But there is fundamental error in taking the pre-war unit of prices as practically the sole basis for ascertaining the reproduction value of the property of the gas company for rate-making purposes. What is said in the opinion of the commission with reference to the costs of producing gas is equally applicable to the cost of reproducing the plant. It is there said, "In any event, there seems little possibility of a return to a general pre-war level. The natural resources of the country are approaching depletion, and when it costs more to mine a ton of coal because it is further back in the mountain, and where there is less lumber in the country every year, and when the oil supply will inevitably decrease, and when the general level of labor will

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likely be above that of pre-war years, evidently the prices of the past cannot be realized." These seem to be good reasons why pre-war prices of reproduction should not be adopted.

We have no case from the Supreme Court of the United States involving rate-making as affected by the inflated prices of the war period, but there are several cases involving a variation of prices from other causes.

In *San Diego, etc., Co.* v. *City of National City*, 174 U. S. 739, it is said: "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the *reasonable value of the property at the time it is being used for the public.*" (Italics supplied.) The commission emphasized the word "reasonable" in the foregoing quotation, and claimed to follow that holding, but departed from it by holding that a value based on a pre-war unit price gave the "reasonable value," although it admitted that there was "little possibility of a return to a general pre-war level."

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 52, it is said: "And we concur with the court below in holding that the value of the property is to be *determined as of the time when the enquiry is made regarding the rates.*" (Italics supplied.)

Three years have elapsed since the close of the war, and neither labor nor materials have declined to anything like pre-war prices. When, if ever, they will, no one can foretell. It would seem that time enough had elapsed to furnish a basis for calculating reproduction costs.

In *Consolidated Gas Co.* v. *Newton* (Southern Dist. New York), 267 Fed. 231, 236, Judge Hand said that, so far as he had found in the books, a test of two years was enough, and cited *Minnesota Rate Cases*, 230 U. S. 352, and *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89. On the same subject, he further said: "The master has taken complete evidence over a period of twenty months—

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from January 1, 1918, to August 31, 1919. Since that time, eleven more months have passed, during which there has been no fall in price levels. The record has some evidence of this down to a later day, but, of course, not down to the date of this opinion. But evidence is not necessary in the face of so patent and obtrusive a fact of daily life, and it is quite fair to say that the condition which the master found as of August 31, 1919, has been aggravated during the succeeding year. The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production and the 'rate base' for a future time long enough to call for some judicial action."

On the subject of the computation of the "rate base," the same distinguished judge said: "The rule of the present reproduction cost as a necessary consequence of the foregoing argument, appears to me to have been either expressly or impliedly recognized in all the cases in which the Supreme Court has passed on these matters. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 10, 29 Sup. Ct. 148, 53 L. Ed. 371; *The Minnesota Rate Cases*, 230 U. S. 352, 434, 454, 455, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151 Ann. Cas. 1916A, 18; *San Diego, etc., Co.* v. *National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; *San Diego, etc., Co.* v. *Jaspar*, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; *Darnell* v. *Edwards*, 244 U. S. 564, 568, 37 Sup. Ct. 701, 61 L. Ed. 1317. It is true that its application has not distinctly arisen since the recent rise in prices, but it is not possible that it should have general application, and yet not cover this, its most glaring illustration."

In *St. Joseph, etc., Co.* v. *Public Service Comn. of Missouri* (Dist. Ct. W. D. Mo., C. D.), 268 Fed. 267, it is said: "The commission took the original cost, when obtainable, and, when not obtainable, average prices for a fixed period

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of five years before war prices prevailed, going back approximately to the year 1910. * * * It is my judgment that the great weight of authority is against the adoption of a standard of original cost as a controlling basis for determining present value. *The present fair value is the object to be attained. Nor do I think it permissible substantially to restrict the enquiry to a period antedating present cost prices.*" (Italics supplied.)

In *Elizabethtown Gas Co.* v. *Public Utility Com'rs* (N. J.), 111 Atl. 729, the commission adopted as a standard of value the average prices prevailing for five years preceding January 1, 1916. Swayze, J., speaking for the Supreme Court of New Jersey, said: "I think it entirely clear that the failure to allow for prices at the time to which the rates apply, July 1, 1919, was an error. It is not denied that prices were very much higher in 1919, and are very much higher now, than the average for the years 1911 to 1916. So notorious is this that the Supreme Court of the United States has referred to it in an opinion as a matter of common knowledge. *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256, at p. 268, 39 Sup. Ct. 454, 63 L. Ed. 968. In that case, on its own responsibility, the court suggested that, in its opinion, the decree ought to be modified to permit the complainant to make another application to the courts for relief. It would be manifestly unjust to apply to a gas company a standard of value different from that applied to others. To what extent the increase in prices may be due to an inflation of the currency or to any other particular cause, we do not know. What we do know, is that the dollar of 1919 and the dollar of 1920 is worth less than the dollar of 1916, and still less compared with the dollar of the average year from 1911 to 1916. If it were proposed to value the property of the gas company on 100-cent dollars and allow them a return only on that, while other values were on the basis of fifty-cent dollars and just double in number, every one would see the injustice; so far as the

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increase in prices is due to inflation of the currency, the illustration is a perfect one."

In *Smith* v. *Ames*, 169 U. S. 546, Mr. Justice Harlan, speaking for the court on the subject of railroad rates, said: "The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How much compensation may be ascertained, and what are the necessary elements in such an enquiry will always be an embarrassing question. * * *

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The word "value " has a peculiar meaning when applied to rate-making. *In re Potomac Electric Power Co.* (Dist. of Columbia), P. U. R. 1917D, 563, 694, it is said:

"The use by the courts and commissions in rate cases of the expressions that public service corporations are entitled to 'a reasonable return upon the fair value of their property' or 'a reasonable return upon the reasonable value of their property,' and similar pronouncements, and the methods adopted by the different commissions and courts in arriving at this fair or reasonable value, clearly indicate that the object and purpose of every valuation upon which rates are to be based is an ascertainment of but one thing—not what the property is worth as an income-producing instrumentality; not for what it would sell or could be bought; not its worth because of its being a monopoly or the holder of rights, easements, franchises, privileges, and benefits accorded it over others to enable it to perform its public duty: but a determined amount, an ascertained and fixed sum, upon which the owners may earn a fair and reasonable return. The sum so arrived at should be one upon which a return may be allowed which will be fair to the in-

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vestor, who has directed his energies and devoted his substance to the creation of this instrumentality, and fair and just likewise to the consumer, who, under modern conditions, is compelled to use the product of the utility in his daily business, social and domestic life.

"If the word 'amount' is substituted in place of the word 'value' in paragraph 7 of the public utilities law, and, in the judgment of the commission, such a substitution not only does no violence to the word 'value,' but gives to it a meaning which Congress intended it should convey, it would follow that it is the duty of this commission to ascertain the fair amount which should represent a just basis for rates of this particular utility as of the time so determined.

"If this view is taken, the determination of fair value becomes the determination of that just and equitable amount upon which, under all the facts, circumstances and conditions of the utilities' construction up to the time of valuation, the return allowed to the utility should be computed."

In *Re Central Union Tel. Co.* (Ind.), P. U. R. 1920B, at p. 824, it is said: "Moreover, assuming normal costs and usual and ordinary conditions, cost of reproduction is not necessarily controlling, for consideration and weight must be given to all other elements entering into the fair value of the property."

The subject of rate-making, especially as applied to a gas company, is discussed with marked ability and a very full citation of authority by the Supreme Court of Illinois in *State Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 125 N. E. 891. It is there said: "The difficulty is that which is always present—to ascertain a standard by which this justice and reasonableness shall be gauged. The necessity of public regulation of rates arises out of the monopoly of the public service company. The unregulated price of the service ceases, except so far as some substitute for the particular service may be found, to be

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determined by competition, and the individual consumer is unable to contract on equal terms. Fixing rates by public authority may secure to each individual the advantage of collective bargaining by or in behalf of the whole body of consumers, and result in such a rate as might properly be supposed to result from free competition if free competition were possible. A just and reasonable rate, therefore, is necessarily a question of sound business judgment rather than one of legal formula, and must often be tentative, since exact results cannot be foretold. *Public Service Gas Co.* v. *Utility Com'rs, supra.* Like so many other questions in the law that involve reasonableness of conduct, it is a question of fact to be settled by the good sense of the tribunal it may come before. That it is not a question of legal formula, is shown by a decision of the United States Supreme Court in *San Diego Land & Town Co.* v. *Jasper, supra,* that a rate may be reasonable, although it fails to produce an adequate return to the public service company, owing to the fact that the business has not developed sufficiently to be remunerative, or to the fact that the plant is on a larger scale than is justified by the present demand. The real test of the justice and reasonableness of any rate seems to be that it should be as low as possible, and yet sufficient to induce the investment of capital in the business and its continuance therein. This, also, is a business question, and depends on the opportunities that may be offered for more profitable investments and the risk involved. In determining the justice and reasonableness of rates, perhaps no better test can ordinarily be found than the rates customarily charged in localities similarly situated. And yet this test is not by any means infallible. What is a reasonable return is a question of fact, the solution of which calls for the exercise of sound judgment and common sense. *Duluth Street Railway Co.* v. *Railroad Com.*, 161 Wis. 245, 152 N. W. 887.

"Appellee contends that the only equitable basis for determining value for rate-making purposes is the cost of

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reproduction now, less depreciation. This contention cannot be sustained. The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a public utility under legislative sanction must be the fair value of the property being used by it for the convenience of the public, and in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the present cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration and are to be given such weight as may be just and right in each case. *Smith* v. *Ames, supra; San Diego Land & Town Co.* v, *National City, supra; Stanislaus County* v. *San Joaquin and King's River Canal & Irrigation Co., supra*; *Chicago Union Traction Co.* v. *City of Chicago, supra; Duluth Street Railway Co.* v. *Railroad Com., supra.*"

The subject is beset with difficulties, and no hard and fast rule can be safely laid down for fixing values for rate-making purposes. Many of the items which enter into the determination of values are mentioned in the cases we have cited, and the commission seems to have given the subject careful consideration. It has, however, emphasized the pre-war unit of valuation, but the reasoning of the opinion seems to indicate that it has not given due weight to the present costs of reproduction and the probable costs thereof during the near future, or for the time during which the rate fixed will pobably be in force, and hence we cannot presume that it has. These are important items to be considered, and it should not be left in doubt whether or not they have been taken into consideration.

It may be said of valuation, what has been said of the return to be allowed: "What is a reasonable return is a question of fact, the solution of which calls for the exercise of sound judgment and common sense." We are constantly measuring ordinary care by the conduct of the "ordinarily careful man," and so here, after hearing all that is said af-

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fecting value, we must measure value by the "sound judgment and common sense" of impartial tribunals charged with the ascertainment of such value.

The *La Porte Case,* so largely relied on by the commission and by counsel for the appellee in their brief, loses much of its force by reason of the fact that the opinion was concurred in by only three out of five of the commissioners. The opinion of Commissioner Haynes is an able one, but Commissioner Johnson only concurred in the order to be made in that case, "but not in the opinion," and Van Auken, commissioner, dissented. The case, furthermore, does not accord with the cases we have cited.

Counsel for the appellee also rely upon the finding of Mr. Justice Hughes, as referee, in *Brooklyn Borough Gas Co.* v. *Public Service Commission,* P. U. R. 1918F, 335, but the facts of that case are entirely different from those in the case in judgment. In the *Brooklyn Case,* there were three different valuations, one based on the original costs or investment; another upon reproduction upon the average unit prices prevailing from 1912 to 1916, inclusive; and the third upon an official valuation made in 1914 and acquiesced in by the company. The third valuation was selected. As the official valuation had been so recently made, it seems manifest that it was the proper valuation to be adopted.

The opinion of the commission does not state what amount was allowed for operating expenses, nor what per cent on the value fixed it considered a fair and reasonable return on the ascertained valuation. It simply fixed the price of gas per thousand cubic feet to be paid by the consumer. Operating expenses are accruing from day to day, and are determined by the prices of today and not of some future date. In any estimate of rates to be paid by the consumer of gas, it is essential to ascertain the costs of operation, for the gross receipts less the costs of operation is what the gas company gets for its service. "The actual cost of its operation must always be taken into consideration in determining whether or not it receives a fair com-

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pensation above that cost." *Brooklyn Borough Gas Case, supra; State Public Utilities Com'r* v. *Springfield Gas & Electric Co., supra.* In 1920 the actual operating expenses of the gas company was $1.668 per thousand cubic feet, and this amount was not called in question by the commission. The highest rate to the consumer was fixed at $1.75 per thousand cubic feet, and the probable average rate at $1.70. This would leave to the gas company only from four to nine cents per thousand cubic feet, which, upon a consumption of a hundred million cubic feet per year, is not a fair compensation for the service furnished. The gas plant was not larger than necessary, and the commission, after fixing the value thereof for rate-making purposes, should have determined the rate of return the company should receive on such valuation and the costs per thousand cubic feet of operation. The aggregate of these two sums, divided by the number of thousand cubic feet of gas to be sold, would give the price to be charged to the consumer. For example, assuming the plant to be valued at $300,000, the return to the company to be ten per cent, and the amount of gas sold to be 100,000,000 cubic feet:

Ten per cent on $300,000	$ 30,000
Cost of producing 100,000,000 cubic feet at $1.66	166,000
	$196,000
Cost to consumer per 1,000 cubic feet.....	$1.96

These figures are given merely by way of illustration, and are not intended to intimate any opinion upon either valuation or percentage. It is manifest that the commission either did not take into consideration the costs of operation or did not accept the company's estimate of such costs. No suggestion of the latter is found in the opinion of the commission.

For reasons stated by the commission, we do not think that the losses sustained by the gas company prior to its application for an increase of rates should be amortized; but if, upon further investigation, it is ascertained that a

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loss has been sustained since that date in consequence of the rate fixed by the commission, such loss should be amortized and spread over such a term of years as will be fair to the gas company and not too burdensome to the consumers.

If in any rate fixed, the gas company should make a profit upon which a tax is imposed, that should be taken into consideration in fixing the per cent of return it is to receive on its investment.

There was evidence before the commission that the service furnished to many customers was of a very inferior character and of no practical value. The regulation of the character of service to be furnished to customers is fully within the powers of the commission, and we shall assume, until the contrary is made to appear, that the commission will exercise that power when ever a proper case is made before it.

In the absence of any statement of facts found by the commission or any tabulation of figures, we are unable to say what rate of charge to the consumer would be fair and reasonable to both the consumer and the gas company, and this case will, therefore, be remanded to the State Corporation Commission, with directions to reconsider the same upon the evidence already before it, and such additional evidence, if any, as it shall permit to be introduced, and to conform its findings to the views hereinbefore expressed; and, in the event of another appeal to this court, to state the facts found by it and to tabulate the figures so as to show clearly how it arrived at its conclusion so far as dependent upon such figures.

Remanded.

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VIRGINIA APPEALS

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VIRGINIA APPEALS

AMERICAN RAILWAY EXPRESS COMPANY *v.* DOWNING.

(Richmond, March 16, 1922.)

1. CORPORATIONS.—Consolidation—Liability of New Corporation for Claim Against Old—Transfer for Value—Lien Upon Property Purchased—Implied Promise to Pay Liabilities—Receipt of Goods for Transportation—Evidence.

Error to Circuit Court of Accomac county.

Affirmed.

Stewart K. Powell, for plaintiff in error.
S. James Turlington, for defendant in error.

This is an action brought by the defendant in error, J. W. Downing, against the plaintiff in error, the American Railway Express Company, to recover certain alleged damages occasioned by the loss, in transit, of 840 pounds of Paris green, a portion of a shipment of that commodity which, it is alleged, the Adams Express Company, on the .... day of June, 1918, received at Kensington, Ill., as the property of, and undertook to transport to, the said Downing at a certain station in Virginia on the N.Y., P. & N. R. R.

The respective parties to the action will be hereinafter referred to as plaintiff and defendant, in accordance with their positions in the trial court.

The Adams Express Company was engaged in the express transportation business, as a common carrier, from said place of shipment in Illinois to said place of destination in Virginia, at the time of said shipment and up to June 30, 1918, inclusive. On the last-named day the Adams Express Company terminated its said business, not only

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between said points, but also throughout Virginia and the United States; and the defendant, on and after July 1, 1918, undertook, as a common carrier, to carry on, throughout the United States, the express transportation business theretofore transacted by the Adams Express Company, the American Express Company, the Wells-Fargo Express Company, and the Southern Express Company.

The defendant, the American Railway Express Company, is a corporation, incorporated under the laws of the State of Delaware on June 22, 1918, and as such authorized to engage in and carry on throughout the States, Territories and possessions of the United States and in the District of Columbia and in adjacent foreign countries, the express transportation business, as a common carrier; the authorized capital stock of the defendant being $40,000,000, divided into 400,000 shares of the par value of $100.00 each, the minimum capital stock with which the corporation was authorized to commence business being $33,000,000.

The undertaking aforesaid, on the part of the defendant, the American Railway Express Company, on and after July 1, 1918, to carry on throughout the United States the transportation business theretofore transacted by the Adams, the American, the Wells-Fargo and the Southern Express Companies, was entered into in pursuance of an agreement between the four companies last mentioned and the defendant. That agreement was entered into some time in June, 1918, prior to July 1, 1918. There is no copy of such agreement in the record of the case before us, and what are or are not some of its provisions may be said to be left in some doubt. At any rate, one of the subjects of controversy in the instant case is whether such agreement on the part of the defendant expressly stipulated that it would be liable for and would pay all of the unsecured indebtedness of the Adams Express Company existing on July 1, 1918.

There are other provisions of said agreement and certain facts attending the organization and the beginning of the business of the defendant on July 1, 1918, and the passing

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into its hands on that day of certain property of the Adams Express Company, about which, however, there is no controversy in the case and which appear from the record before us. These are as follows:

The defendant began its business aforesaid on July 1, 1918. Prior to that date it owned no property whatever. On that date, in pursuance of said agreement between it and the four other express companies aforesaid, the defendant took over from such four other express companies certain property theretofore belonging to such other companies at a valuation of $30,000,000, to be paid for by the issuance of capital stock of the defendant of the par value of that amount and delivery of such stock to such four other express companies. The property of the Adams Express Company which was thus acquired by the defendant was the whole of the tangible property then owned and used by the Adams Express Company in its express business aforesaid throughout the United States, including all of such property in Virginia, which was considerable in quantity; and this property was taken over, as aforesaid, at its book value, *i. e.*, its value as carried at the time on the books of the Adams Express Company. What this precise value was, or what was the precise amount of the stock of the defendant which was given therefor to the Adams Express Company does not appear from the record before us; but it does appear from the record that this value and stock amounted to a great many millions of dollars—far more than sufficient to pay the plaintiff's claim.

At the time the property aforesaid of the Adams Express Company was taken over, as aforesaid, on July 1, 1918, and the defendant agreed to issue its stock therefor, as aforesaid, the defendant knew that an indefinite number and amount of unliquidated claims against and unsecured obligations of the Adams Express Company, of the character of the claim of the plaintiff, were in existence, outstanding and unsatisfied.

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At the time of the trial the defendant, as a matter of fact, had issued and delivered to the Adams Express Company only about seventy-five per cent of the stock which was to be issued to it, as aforesaid, in payment for the property of the Adams Express Company taken over by the defendant, as aforesaid.

After June 30, 1918, the Adams Express Company had no agent in Virginia on whom process could be served so as to commence a suit or action in Virginia against it; nor any property in Virginia which could be attached. It appears that on and after July 1, 1918, the Adams Express Company did own some property, located elsewhere than in Virginia, and other than that which was turned over to the defendant, as aforesaid; but what was the character or value of such other property, or just where it was or is located, does not appear.

So far as appears from the record, the Adams Express Company, on and after July 1, 1918, has engaged in no business other than that of winding up its affairs, including the liquidation of its outstanding liabilities and obligations; and for that purpose has had an office in New York city, with its official organization intact, consisting of its president, secretary, treasurer, general counsel and its claim departments.

Other material circumstances are referred to in the opinion of the court.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The following is the chief question presented for our decision by the assignments of error, namely:

1. Is the defendant answerable to the plaintiff for the liability of the Adams Express Company to the plaintiff which existed at the time the defendant took over the entire business of the Adams Express Company as a going concern and all of the tangible property of the latter theretofore used in its business, because of the circumstances

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that the entire existence of the Adams Express Company as a going concern was consolidated or merged in the defendant; that the liability existed at the time of such consolidation or merger, and was actually or constructively known to the defendant to so exist; that the property so taken over was more than sufficient to pay the liability, and that the defendant did not undertake to pay anything for the property except its own capital stock?

This question must be answered in the affirmative.

As said in 6 Am. & Eng. Enc. Law (2nd ed.) p. 818, sec. 4: "When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporations whose liability is sought to be enforced against the consolidated corporation."

As pointed out, however, in the valuable work just quoted, the essential element of the liability of the new corporation in such case, and the basic reasons therefor, are: first, that only by a transfer for value can the property of a corporation or other debtor be transferred so as to defeat the claims of creditors (*Idem.*, pp. 819, 822); and, secondly, that the new corporation does not occupy the relation of a purchaser for value of the property of the old company, where it gives nothing for the property but its own capital stock.

If, indeed, the property of the old company is acquired by the new corporation by actual *bona fide* purchase for value, it is well settled that the new corporation is not liable for claims against the old company which do not constitute liens upon the property purchased. *Idem.*, p. 819.

Concerning a similar situation to that under consideration in the case in judgment, this is said in *Young* v. *The Steamboat Key City,* 14 Wall. 653, 20 L. Ed. 896: "* * * neither the stockholders of" (the old company) "nor of the new corporation have ever parted with or paid any money

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or other thing of value for" (the property), "otherwise than by this consolidation of the companies into one; and it is not apparent, nor even a reasonable presumption, that, if the new company has to pay the libellant's debt in this case, they will be the losers, but it is nearly certain the loss will fall where it should—on the stockholders coming in through the" (old company).

As said in 5 Thomp. on Corp. (2nd ed.), sec. 6083: "* * * the consolidated corporation, as a rule, even in the absence of statute, or agreement, assumes all the liabilities of the constituent companies, and they may be enforced by a direct action against it as it is presumed to have notice of the rights of creditors."

As said in *Jennings, Neff & Co.* v. *Crystal Ice Co., etc.* (Tenn.), 159 S. W. 1088, 47 L. R. A. (N. S.) p. 1061: "The doctrine that corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution of corporate property is made among stockholders, is fully established in Tennessee, and creditors have a right to follow its assets or property into the hands of any one who is not a holder in good faith in the ordinary course of business. *Vance* v. *McNabb, etc., Co.,* 92 Tenn. 47, 20 S. W. 424; Pom. Eq. Jur., par. 1046.

"There is abundant authority likewise for the proposition that where one corporation, for its own stock and bonds, purchases all the assets of another, without provision for the debts of the latter, the transaction is out of the ordinary course of business, and the very circumstances of the case imply full knowledge on the part of the purchasing corporation of all facts necessary to charge the property in its hands with the debts of the selling corporation." (Citing authorities.)

* * * *

"It follows that when the purchasing corporation took over in exchange for its own stock and bonds the assets of the other, and permitted these securities, which had been

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substituted for the visible tangible property of the selling corporation, to be distributed among the stockholders of the latter, without provisions for the creditors of the latter, it thereby became a party, with full notice, to the diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which the property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

"Creditors of the old corporation cannot be required to look alone to the stock and bonds which were substituted for the real, tangible assets of that corporation. The value of the securities so substituted is more or less problematical, and creditors should not be forced to surrender their claims against available, visible assets, and transfer such claim to new securities. Their remedy cannot be hindered and impaired for the benefit of stockholders. * * *

"We are aware that there is some conflict in the cases as to the right of creditors under circumstances such as these, but we think the views we have expressed are sustained by the weight of authority. We have no hesitancy in announcing our belief that such views are correct, and they are in harmony with the following cases: *Altoona* v. *Richardson Gas & Oil Co.*, 81 Kan. 717, 26 L. R. A. (N. S.) 651, 106 Pac. 1025; *Grenell* v. *Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; *Hurd* v. *New York, etc., Steam Laundry Co.*, 107 N. Y. 89, 60 N. E. 327; *McIver* v. *Young Hardware Co.*, 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; *Ft. Payne Bank* v. *Alabama Sanitarium*, 103 Ala. 358, 15 So. 618; *Chattanooga R. & C. R. R. Co.* v. *Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *Hibernia Ins. Co.* v. *St. Louis & N. O. Transp. Co.* (C. C.), 4 McCrary, 432, 13 Fed. 516; *Vicksburg & Y. City Teleph. Co.* v. *Citizens Teleph. Co.*, 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725."

See also to same effect notes in 47 L. R. A. (N. S.) 1058-9; 11 Idem. 1119-1132; and cases cited.

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Many of the authorities, in the absence of statute fixing the liability (which is the situation touching the case in judgment), regard the liabilities of the consolidated corporation for the unsecured debts of its constituent companies as in truth resting upon the agreement, express or implied, of the consolidated corporation to pay such debts; and this we think, upon principle, is, in such case, the true ground on which the obligation rests.

In *Morrison* v. *American Snuff Co.*, 79 Miss. 330, 30 So. 723, 89 Am. St. Rep. 598, this is said: "The foundation of the liability of a consolidated corporation may rest on a statute, or on an agreement, either expressed or implied. If the statute does not provide that the new company shall assume the debts and liabilities of the constituent companies, and there is no expressed agreement respecting the same, the debts of the original companies follow as an incident of the consolidation and become by implication the obligations of the new corporation." (Citing authorities.)

The consolidated company has in its hands property which, in equity and good conscience, belongs to the plaintiff to the extent of having his claim satisfied thereby; and, wherever property, or money, is so held, "the law operating on the acting parties creates the duty, establishes the privity and implies the promise and obligation on which the action is founded." *Brewer* v. *Dyer*, 7 Cush. (Mass.) 339. See to same effect, *Moses* v. *Macferlan*, 2 Burrow 1012; Clark on Contracts, sec. 314, p. 757; *Norfolk* v. *Norfolk County*, 120 Va. 356, 91 S. E. 820; 2 R. C. L., sec. 9, pp. 749-750.

Where the circumstances are such that the law implies the promise on the part of the consolidated corporation to pay the liabilities of the constituent companies, the situation is precisely the same in principle, as if such promise were an express promise; and the plaintiff for whose benefit such promise exists may recover upon it by action at law against the promisor, upon either of the principles aforesaid. *Langborne* v. *Richmond R. Co.*, 91 Va. 369, 22 S. E. 159, and *Cosmopolitan Life Ins. Co.* v. *Koegel*, 104 Va. 619, 629-631.

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As said in *Langborne* v. *Richmond R. Co., supra:* "Where two * * * companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities of those out of which it is created. *Tomlinson* v. *Branch,* 15 Wall. 460, and *Tennessee* v. *Whitworth,* 117 U. S. 139, 147. The corporation which is created by such consolidation * * * is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name * * * for their debts as if no change had been made in the name, or in the organization of the original corporations. Jones on Railroad Securities, sec. 415; 1 Thompson's Com. on Corp., secs. 372, 373, 395; 1 Beach on Private Corp., secs. 343, 344; 1 Morawetz on Corp., sec. 955; Taylor on Corp., sec. 666; 4 Am. & Eng. En. Law, 272, n."

And, as held in *Cosmopolitan Life Ins. Co.* v. *Koegel,* the plaintiff's right of action exists in "those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, by his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. See note 1 Chitty on Pl., p. 5, where a number of cases are cited as belonging to a class in which it is said 'the law (in such cases) creates the privity and implies the promise.' " (Citing also numerous other authorities to the same effect.)

It is not essential to the existence of the liability of the new corporation which we have been considering that such corporation should have received *all* of the property of its constituent companies. As said in 5 Thomp. on Corp. (2nd ed.), sec. 6085: "Consolidated companies receiving most of the property of the old companies are held to be liable

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for the debts of such uniting companies to the extent of the property received by them." See to same effect *Berthold* v. *Holladay-Klotz Land & Lumber Co.*, 91 Mo. App. 233; *Hurd* v. *New York, etc., Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327.

In truth, the quantity of the property transferred, as compared with that retained, is material only to this extent: If there is not sufficient property retained by the constituent company, within the jurisdiction of the courts of the State, to satisfy the obligation of such company to the plaintiff, so that the remedy of the plaintiff is substantially impaired, and the other aforesaid requisite circumstances exist, the liability we have been considering will arise; if, on the other hand, there is sufficient property so retained, as to leave the remedy of the plaintiff substantially unimpaired, even if the aforesaid other circumstances do exist, the liability will not arise.

Again: It is not essential to the new corporation being considered as a *consolidated company*, within the meaning of those terms as used in the authorities above cited and quoted from, nor to the liability of the new corporation above referred to, that the constituent companies should cease to exist *de jure* upon the organization of the new corporation. The going "out of existence" of the constituent companies—to which the quotation above made from 6 Am. & Eng. Enc'l Law, sec. 4, p. 818, and other authorities on the same subject refer—is the cessation of all actual transaction of business as a going concern— the *de facto* cessation of all business—the abandonment of all life and operation according to the design of the charter of the constituent companies. The continued existence *de jure* of the constituent companies for the purpose of winding up their affairs or other purposes, is immaterial. *Berthold* v. *Holladay-Klotz Land & Lumber Co.*, 91 Mo. App. 233; *Montgomery, etc., R. Co.* v. *Branch Sons & Co.*, 19 Ala. 139; 5 Thomp. on Corp. (2nd ed.), sec. 6041.

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As said by the authority last cited: "The termination of the existence of the constituent companies is not necessary to either the accomplishment or validity of the consolidation * * *."

The defendant relies upon *McAlister* v. *American Railway Express Co.* (N. C.), 103 S. E. 129, and it must be said that the holding in that case is directly contrary to our holding above. But such holding is, as we think, also directly contrary to the great weight of authority and to the true principles involved, and for those reasons we cannot follow it.

The other cases relied on by the defendant are the following: *Seaboard Air Line Ry. Co.* v. *Leader*, 115 Ga. 702, 42 S. E. 38; *Whiting* v. *Malden, etc., R. Co.*, 202 Mass. 298, 132 Am. St. Rep. 493; *Austin* v. *Tecumseh Nat. Bank*, 49 Neb. 412; *Colorado, etc., R. Co.* v. *Albrecht*, 22 Colo. App. 201, 123 Pac. 957; *Bruffett* v. *Great Western R. R. Co.*, 25 Ill. 353; *Hallidie Machinery Co.* v. *Washington Brick, etc., Co.*, 70 Wash. 80, 126 Pac. 96. These cases are not inconsistent with our holding above. They hold merely that, in the absence of statute imposing the liability, for the new corporation to be liable for the unsecured debts of its predecessor, it must appear, either that the new corporation expressly assumed the liabilities of its predecessor or that the circumstances are such that the law charges the new corporation with such liability; that, in the absence of a statutory provision on the subject, the mere fact that the property of a company is acquired by another company or individual does not of itself make the new holder of the property liable for the debts of the seller of it; for, *non constat*, the new holder may have been a *bona fide* purchaser of the property for value in the ordinary course of business, in which case such holder would not be liable for debts which were not liens on the property. All of this is in entire accord with true principles and with our views upon the subject.

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Much of the argument before us has concerned the question of fact of whether there was an express agreement in the case in judgment on the part of the defendant to pay the unsecured debts and liabilities of the Adams Express Company existing at the time of the consolidation aforesaid; but our view being, as aforesaid, that under the circumstances of this case, the law will imply such agreement, it is, of course, unnecessary for us to deal with such question of fact.

There is but one other question presented by the assignments of error for our decision, and that is this:

2. Was there sufficient evidence before the jury to support their finding to the effect that the Adams Express Company, in June, 1918, received, at Kensington, Ill., the quantity of the goods in question for transportation to the plaintiff, as alleged?

This question must be answered in the affirmative.

A witness for the plaintiff, who was the depot agent of the defendant at the place of destination of the goods in Virginia, was permitted by the trial court, over the objection of the defendant, to testify as to what a certain entry in the delivery record book of the Adams Express Company showed was the shortage on a shipment of said goods to the plaintiff from Kensington, Ill., on May 18, 1921, which was a different shipment from that on which the action was based. The defendant contends that such testimony as to such book entry was improperly admitted in evidence for several reasons (which need not be set forth here), and hence that the case should be considered as if such testimony were not in the record; and that if such testimony were stricken out of the record there would be no testimony left to support the verdict in the particular in question. This position of the defendant overlooks the fact that the plaintiff himself testified, without objection thereto on the part of the defendant, that prior to the trial he received a receipt from "the agent at Kensington, Ill., * * * showing the shipment" in question, which receipt, other testi-

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mony for plaintiff before the jury showed, was turned over to counsel for the defendant prior to the trial. The agent at Kensington, Ill., was agent for the defendant at the time he sent the plaintiff the receipt mentioned. There was, therefore, ample evidence before the jury to support the finding in question.

The case will be affirmed.

Affirmed.

BARNARD v. BARNARD.

(Richmond, March 16, 1922.)

1. DIVORCE.—Evidence—Oral Testimony—Weight—Appeal and Error—Code sec. 5109.
2. IDEM.—Alimony—Custody of Child—Costs and Counsel Fee.

Appeal from Circuit Court of Norfolk county.

Affirmed.

Williams, Loyall & Tunstall, for the appellant.

E. R. F. Wells, for the appellee.

BURKS, J.:

Alice Smith Barnard brought a suit for a divorce from bed and board against her husband, W. Frank Barnard, on the ground of cruelty, reasonable apprehension of bodily harm and constructive desertion. The bill also prayed for the custody of their child—a boy about five years of age—for suit money and for alimony. The defendant answered the bill, denying specifically every allegation thereof, and further charging his wife with various acts of incontinence and with conduct on her part entitling him to a divorce from the bond of matrimony. He prayed that his answer, in so far as it charged his wife with incontinence and mis-

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conduct, be treated as a cross-bill, and it was so treated, and the wife answered the same, denying specifically every allegation thereof. On the motion of the complainant (Mrs. Barnard) and with the consent of the defendant, the trial court ordered that the testimony in the cause (except that of certain witnesses beyond the jurisdiction of the court) be given orally in open court, and a day fixed for the hearing. The testimony was subsequently so taken and forty-four witnesses were examined in open court, and five, who were non-residents, testified by depositions, after due notice. On October 23, 1920, the trial court entered a decree dismissing the defendant's cross-bill and granting to the complainant (Mrs. Barnard) a divorce from bed and board on the grounds stated in her bill. Costs were awarded to Mrs. Barnard, and she was given a decree against her husband for $100.00 a month for the support and maintenance of herself and of her child while the latter is in her custody, and the custody of the child was awarded to each of the parents for one week at a time, alternate weeks. The cause was retained on the docket until the further order of the court. From this decree the defendant, W. Frank Barnard, was awarded an appeal.

The testimony in the case is of the most conflicting nature. There is hardly a material fact in the case upon which the testimony on the two sides is in harmony. It is necessary, therefore, in the outset to determine what weight is to be given to the decree of the trial court which heard the parties and most of their witnesses testify orally in open court. We have no interpretation of our statute on the subject. Section 5109 of the Code is as follows:

"In any suit for divorce, the trial court may require the whole or any part of the testimony to be given orally in open court, and if either party desires it, such testimony and the rulings of the court on the exceptions thereto, if any, shall be reduced to writing, and the judge shall certify that such evidence was given before him and such rulings made. When so certified, the same shall stand on the

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same footing as a deposition regularly taken in the cause."

This section is taken from Acts of 1914, page 154, which is as follows:

"In all divorce cases pending at the time this law goes into effect, or thereafter instituted, it shall be within the discretion of the court to require the testimony, or any part of it, to be delivered *ore tenus* in open court, and the testimony so delivered, together with exceptions taken to the ruling of the court on questions of evidence, together with the evidence taken in the cause, shall be preserved and put into the record of the cause for the purpose of an appeal, and the cause on appeal shall be heard as other chancery causes, and not as on a demurrer to evidence, and within the same time as now provided by law."

There is no revisor's note to section 5109 indicating what, if any, change was intended by the change in the phraseology of the act, which generally means that no material change was intended, as explained by the revisors in the preface to the Code, pages xi, xii. There is, however, one material change made by the Code. The act of 1914 declared that the oral testimony taken on the hearing "shall be preserved and put into the record of the cause for the purpose of an appeal," whereas section 5109 of the Code only requires this to be done "if either party desires it." There was no necessity for this expense unless one of the parties, for some cause desired it, and if no appeal was to be taken the parties might prefer that the testimony should be kept out of the permanent files of the court as well as to avoid the costs thereof. This difference between the two statutes is manifest, and must be given effect, even though not noted by the revisors. Other differences in the phraseology of the two statutes do not manifest an intent to change the meaning, and the presumption, supported by the statement of the revisors in the preface aforesaid, is that no change was intended. The act of 1914 declared that "the cause on appeal shall be heard as other chancery causes, and not as on a demurrer to the evidence,"

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whereas section 5109 of the Code, referring to the certificate of the oral testimony, declares "when so certified the same shall stand on the same footing as a deposition regularly taken in the cause." In other words, the suit was still a suit in chancery, and the rule requiring cases at law to be heard as on a demurrer to the evidence had no application. The language of the Code is not as apt as it might have been to accomplish this purpose, but it is fairly plain that the revisors did not intend any substantial change in this respect, and this view accords with the notes of the writer of this opinion, who was one of the revisors. Other sections of the chapter on divorce clearly negative the idea that a suit for divorce could ever be heard "as on demurrer to the evidence." Section 5109, however, does not determine what weight shall be given to the decree of the trial court where the evidence has been given orally before it. When all of the evidence in a chancery cause, as well as the pleadings, have been reduced to writing, and that court has nothing before it but the written record, including the evidence prepared by others, it has little, if any, advantage of this court in determining the right of the cause. But the case is entirely different where the trial court has the witnesses before it and can observe their demeanor on the stand, and their manner of testifying. This is important in determining their credibility and the weight to be given to their testimony. It is something that cannot be photographed or otherwise placed on the record for review by an appellate court, and great weight has always been attached to the finding of the tribunal charged with weighing such evidence, whether it be a commissioner in chancery, a jury, or a court. Of these tribunals, the least weight is given to the findings of a commissioner in chancery, but even in that case, it is said, "When, therefore, the commissioner has seen and examined the witnesses, and the testimony is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, the court will not set aside or disturb his report, unless the

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weight of the testimony which is contrary to his conclusions is such, on account of the number of the witnesses and the nature of their evidence, as to make it clear that the commissioner has erred." *Shipman* v. *Fletcher*, 91 Va. 473, 479.

In enacting the act of 1914, the legislature may have thought that, because the testimony was taken orally, some one might conceive the idea that it might be demurred to, or that on an appeal the case should be heard as on a demurrer to the evidence, and inserted the provision, out of abundant caution, in order to negative that idea, but no such idea could ever have been sustained. The suit for divorce is a chancery suit where the court decides both the law and the facts, and no jury is needed, and where there is no jury there can be no demurrer to the evidence. *Reed & McCormick* v. *Gold*, 102 Va. 37. But, more particularly, there can be no demurrer to the evidence, nor hearing of a case as on a demurrer to the evidence in a suit for divorce because the concessions required in such case are forbidden by section 5106 of the Code, which has been the fixed policy of this State for over three-quarters of a century. Code 1849, ch. 109, sec. 9. There was no necessity, therefore, for the clause in the act of 1914 forbidding the hearing as on a demurrer to the evidence, and it was omitted by the revisors. The same principle now prevails, and the case cannot be heard as on a demurrer to the evidence. Whether, under the existing law, the finding of the trial court shall be given the same force as the verdict of a jury, as is done in actions at law where the whole case is submitted to the judge, without the intervention of a jury, it is unnecessary to decide, as we are of opinion that such finding is, at the least, entitled to the weight of the report of a commissioner in chancery, upon conflicting testimony, who saw and heard the witnesses testify, and whose report is supported by competent evidence and approved by the trial court. The provision of section 5109 of the Code, putting the certified evidence on "the same footing as a deposi-

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tion," could not have been intended to deprive the trial court of the chief benefit conferred upon it by that section —that of seeing the witnesses and hearing them testify. The judge was to hear the case and decide it on its merits, independently of the admissions of either party in the pleadings or otherwise," and, in order to reach a righteous judgment, the statute, for the first time in this State, conferred upon *the court* the right to "require the whole or any part of the testimony to be given orally in open court." The object of the statute was not to save costs to the parties, nor to keep the testimony from the permanent files of the court; but to give the court the opportunity of seeing and hearing the witnesses. The right to have oral testimony in open court is not conferred upon the parties, but upon the court, and it could only have been for the reasons stated. To give to such testimony only the weight given to a deposition taken before some other officer would practically nullify the statute, which could never have been intended. A deposition of a witness must be reduced to writing. It must be signed by the deponent. It must be taken after due notice to the adverse party. It must be taken before an officer authorized by law to administer an oath, who must certify that he did administer the oath to the deponent, all exceptions to questions must be noted at the proper place, and he must then return the deposition to the officer and in the manner required by law. It must in some way appear from the record that the opposing party was afforded the opportunity to cross-examine the witness. In these respects the certified evidence is to stand on "the same footing" as a deposition regularly taken in the cause. But the two are not entitled to the same weight, and the language of the statute, when read as a whole as it should be, manifests a purpose on the part of the legislature to put the trial court in a better position to decide the case by hearing the evidence "orally in open court," than it was when confined to hearing the case on depositions only.

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The evidence in this case is very voluminous, consisting largely of many charges and counter-charges, explanations and counter-explanations, and inculpatory or explanatory circumstances or corroboration of one side or the other. The record shows that the litigants are persons of character and good standing in the community in which they live, and in our view of the statute aforesaid, a detailed examination and discussion of the evidence is unnecessary, and to place it upon the permanent records of this court would not be conducive to the happiness of the litigants or their offspring. It must be sufficient to say that it has been carefully read and considered, with an earnest desire to do justice between the parties. The learned and upright judge of the trial court was in a far better position than this court to correctly determine the rights of the parties, and, while there is much conflict in the testimony, there is abundant evidence to support his decree, and we are unable to say that even the weight of the testimony is contrary to his conclusion. Indeed, if the certified evidence was given no more weight than a deposition, we should still be unable to say that the decree of the trial court was erroneous. His finding, therefore, will be affirmed.

The appellee assigns as cross-error the refusal of the trial court to increase the allowance of $100.00 a month to her for the support and maintenance of herself and child to $150.00 a month. In this, there was no error. The appellant is a young lawyer with no fixed income, but a practice of variable value with no income-producing property. His income from his practice for the year 1919 was about $3,500.00, but for the six months prior to the date of testifying did not exceed $100.00 a month. He lives in an expensive home which he had provided for himself and wife, but it is heavily mortgaged, and upon this he has the interest to pay besides the expense of the upkeep. He is also indebted from $1,000.00 to $1,500.00 and has now all the expense of both sides of this litigation to pay, and it is not clear what, if any, surplus would remain if these debts

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were paid. It must also be borne in mind that the appellee is a young woman, only twenty-eight years of age, and that under modern conditions there is open to her practically every avenue for making money that is open to her husband, that by the decree of the court she is released from her former household duties, that her time is her own, and that she has no right to remain idle at the expense of her former husband, and that it is her duty to minimize his loss, albeit it was through his fault that she was compelled to ask that the contract of marriage be rescinded.

The appellee also assigns as cross-error so much of the decree as gives to the appellant the custody of their child each alternate week. Of course, the welfare of the child is the question of primary importance. Conceding the suitability of the appellee and propriety of custody by her, it may be said on behalf of the father that it appears from the testimony that there is a very warm attachment and unusual devotion between the father and son; that it has been the habit of the father to undress him and to put him to bed at night, and to wash and dress him in the morning and to be his constant companion when at home during the day; and that the father's home is out of the city, where the child can have abundant playground and fresh air. The record discloses that the custody of the father is as suitable and proper as that of the mother. It does not disclose any error on the part of the trial court in dividing the custody between them. The case is retained on the docket. The decree as to the custody of the child is temporary and may be changed at any time and in any manner that the best interest of the child demands. The subject of the custody of the child in a case of this kind is one of the most difficult that the courts have to deal with, and this is especially true of an appellate court. The only general rule that can be announced is that the welfare of the child is the primary matter for consideration, and that this rule is to be administered with as much consideration for the tender ties of affection of the parents as possible under the

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circumstances. When that appears from the record to have been done by the trial court, this court will not hunt for any other reason to affirm its decree.

The appellee asks this court to give her a decree against the appellant for the clerical expense of the preparation of the brief of her counsel in this court and for the printing of the same, aggregating $143.40, and also for a reasonable fee to her counsel for his services in her behalf in this court. She is entitled to this. The fee of her counsel in this case in this court will be fixed at $100, and a judgment will be entered in this court in her favor against the appellant for the aggregate of these two sums, and for her costs, and the decree of the Circuit Court of Norfolk county will be affirmed.

Affirmed.

BOWEN v. COMMONWEALTH.

(Richmond, March 16, 1922.)

1. CRIMINAL LAW.—Jury—Number of Jurors—Code secs. 4895, 4927 Const. sec. 8—Misdemeanors—Objection to Irregularity.

Error to Corporation Court of city of Buena Vista.

Affirmed.

John Dabney Smith, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

KELLY, P.:

The defendant, W. R. Bowen, was arrested and tried by the mayor of the city of Buena Vista upon a warrant charging him with the larceny of certain brass pipes, valves and other brass articles, of the value of thirty-five dollars, and was sentenced to serve a term of six months on the State

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convict road force. From that sentence he appealed to the Corporation Court, where he was tried by a jury, found guilty, and again sentenced to six months' imprisonment.

The sole ground on which we are asked to reverse the judgment is that the defendant was tried by a jury of seven instead of five, the latter being the number provided for in such a case by section 4927 of the Code.

The record shows that the court impanelled a jury of seven men, "who being elected, tried and sworn to well and truly say, and a true verdict render, between the Commonwealth and the accused according to law and the evidence," returned the verdict above indicated; and that the defendant moved the court to set the same aside as contrary to the law and the evidence, which motion the court overruled. No grounds whatever for the motion were stated. No exceptions of any kind were noted at the trial. There was no challenge as to any individual juror or as to the jury as a whole. The evidence was not certified, and the foregoing recital contains the substance of the entire record before us.

Section 8 of the Virginia Constitution, so far as material here, provides as follows:

"That in all criminal prosecutions a man hath a right to * * * a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; provided, however, that * * * in a prosecution for an offense not punishable by death, or confinement in the penitentiary, upon a plea of not guilty, with the consent of the accused, given in person, and of the attorney for the Commonwealth, both entered of record, the court, in its discretion, may hear and determine the case, without the intervention of a jury; and that the General Assembly may provide for the trial of offenses not punishable by death or confinement in the penitentiary, by a justice of the peace, without a jury, preserving in all such cases the right of the accused to an appeal to and trial by jury in the circuit or corporation court; and may also pro-

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vide for juries consisting of less than twelve, but not less than five, for the trial of offenses not punishable by death, or confinement in the penitentiary, and may classify such cases and prescribe the number of jurors for each class."

Section 4927 of the Code of 1919 provides, among other things, that "seven jurors shall constitute a panel in the trial of misdemeanors, but the jury therefor shall be composed of five."

Section 4895 of the Code provides that "no irregularity in any writ of *venire facias,* or in the drawing, summoning, returning or impannelling of jurors * * * shall be cause * * * for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out, was made before the jury was sworn, and unless it appears that such irregularity, or error, * * * was intentional or such as to probably cause injustice to the Commonwealth or to the accused."

In *Brown* v. *Epps,* 91 Va. 726, this court (overruling *Miller* v. *Commonwealth,* 88 Va. 618) questioned whether the constitutional right to a jury trial was intended to apply to misdemeanors; but, leaving that question open, expressly decided that Article I, section 10 of the Virginia Constitution (Bill of Rights), adopted in 1869, declaring (like section 8 of the present Constitution) "that a man hath a right to a speedy trial by an impartial jury," means that the accused has a *legal claim* to a jury trial—that such is his *privilege*—but that the presence of a jury in a criminal trial is not thereby made essential to the jurisdiction of the court, and that the right or privilege thus conferred may be waived. Distinguishing the above-cited section of the Virginia Bill of Rights from Article III, section 2, clause 3 of the United States Constitution, and from the sixth amendment thereto, Judge Keith, in *Brown* v. *Epps, supra,* said: "The language of our Bill of Rights differs from each and both of these provisions. It does not declare that 'the trial of *all* criminals *shall be* by jury'; it does not declare that 'the accused *shall* enjoy the right to a

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trial by an impartial jury,' but its language is 'that a man hath a right to a speedy trial by an impartial jury'; that is, he has a legal claim to a trial by a jury. A trial by a jury is his privilege. The existence of the presence of a jury is not made a jurisdictional fact, without which a court is not duly organized for the trial of criminals, as is the case in all courts of the United States."

Both in *Miller* v. *Commonwealth, supra,* and *Brown* v. *Epps, supra,* it was held that the General Assembly could validly provide for waiver of a jury trial by the accused in a misdemeanor case.

In *Shick* v. *United States,* 195 U. S. 65, 49 Law Ed. 99, 103, Mr. Justice Brewer, delivering the opinion of the court, said: "Where there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. Authorities in the State courts are in harmony with this thought. In *Com.* v. *Dailey,* 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel, and consented to be tried by eleven jurors; and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said (p. 83): 'He may waive any matter of form or substance, except only what may relate to the jurisdiction of the court.' The same doctrine was laid down in *Murphy* v. *Com.,* 1 Met. (Ky.) 365; *Tyra* v. *Com.,* 2 Met. (Ky.) 1; and in *State* v. *Kaufman,* 51 Ia. 578, 33 Am. Rep. 148, 2 N. W. 275. In *Connelly* v. *State,* 60 Ala. 89, 31 Am. Rep. 34, a statute authorizing the waiver of a jury was sustained. The same rule was made in *State* v. *Worden,* 46 Conn. 349, 33 Am. Rep. 27, which was a case of felony. See also *people* v. *Rathbun,* 21 Wend. 509, 542."

In the note found in 9 Ann. Cas. 263, citing numerous cases, it is said: "In jurisdictions wherein it is held that a jury may be waived by the accused, such waiver may be by a failure on the part of the accused to demand a jury."

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We have referred to the foregoing authorities not because we have regarded them, so far as they relate to the waiver of a jury trial, as being directly in point here, but to show how far the courts generally have gone in recognizing the power of a defendant to make, and the power of the trial court to enforce, the waiver of a right or privilege on the part of the accused when the enjoyment of such right or privilege is not a fact essential to the court's jurisdiction.

It is unquestionably true that under section 8 of the present Constitution in Virginia there can no longer be any doubt that the guarantee of the right to a jury trial applies to misdemeanors as well as to felonies; and it may plausibly be argued that the presence of a jury in any criminal trial in a court of record is now, by reason of the terms of that section, essential to the jurisdiction, unless waived in the precise manner therein prescribed. Whether such an argument be sound, especially where, as here, the case does not originate in a court of record, but is first tried by a magistrate or police justice, we need not decide, because that question is not before us. But there is certainly nothing in the constitutional provision under consideration to warrant the view that a person on trial for a misdemeanor may not waive all irregularities as to the manner in which the jury is organized and constituted, especially where such waiver is provided for by statute.

The reasoning of the above authorities and the common-sense view of the question would seem to lead inevitably to this conclusion. The proposition asserted by Chief Justice Shaw, quoted by Mr. Justice Brewer in the *Shick Case, supra,* that the accused "may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court," is undoubtedly a sensible and sound proposition, supported by the great weight of authority.

The waiver of precisely such an irregularity as the defendant here complains of is provided for by section 4895 of the Code, which expressly declares that "no irregularity

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in * * * impanelling of jurors * * * shall be cause * * * for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out was made before the jury was sworn; or unless it appears that such irregularity * * * was intentional, or such as to probably cause injustice to the Commonwealth or to the accused." A jury is "impanelled" in a legal sense—certainly in one of the senses in which that term is correctly used in American practice—when it is ready to try the case. Whart. Cr. Law, sec. 590; 1 Rapalje & Lawrence Law Dict. 627; 4 Words and Phrases 3417; *State* v. *Ostrander*, 18 Ia. 446; *State* v. *Hurst*, 123 Mo. App. 39, 99 S. W. 820. The irregularity in impanelling the jury in this case was not objected to either specifically or in any way, and there is nothing to indicate the slightest injustice or prejudice to the prisoner. He was tried by a jury of seven instead of five, but, so far as the record shows, the seven were all free from exception, and, in view of this fact, it would seem that instead of having been prejudiced by a larger number of jurors than the law required, he was presumably given an advantage by the larger number. At common law, the right to a jury trial meant the right to be tried by a jury of twelve, and when the Virginia Constitution reduced the number from twelve to five, the provision was not an enlargement, but a restriction, of the common law right. It is fair to say, therefore, that instead of getting less, the defendant got more than he was entitled to when he was tried by a jury of seven qualified and impartial jurors.

In *McCue* v. *Commonwealth*, 103 Va. 870, 1006, Judge Keith, in an opinion refusing a writ of error to a sentence of death, quoted with approval the following from *McKinney* v. *People* (Ill.), 43 Am. Dec. 65: "A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on account of such irregularities. The law, by furnishing him with counsel to defend him, has

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placed him on the same platform with all other defendants, and if he neglects in proper time to insist upon his rights, he waives them."

To award a new trial to this defendant, who brings to us a skeleton record showing no irregularity in his conviction, save the fact that he was tried by seven jurors instead of five, would be stretching the constitutional and statutory guarantees upon which he relies to an unreasonable extent, and would be little, if any, short of trifling with justice.

No error is shown in the record, and the judgment complained of is affirmed.

Affirmed.

ERNEST BROWN v. COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. MURDER. — Convict—Degree of Punishment — Identity — Former Conviction—Evidence.

Error to Circuit Court of Orange county.

Affirmed.

E. H. DeJarnette, Jr., for plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

BURKS, J.:

The plaintiff in error, hereinafter called the accused, was a penitentiary convict, and murdered the guard who had him in custody. He was convicted of the offense and sentenced to be electrocuted, which is the only punishment provided by statute. The jury had no option to fix any less punishment. Code, section 5051. It was essential for the Commonwealth, in a proceeding for this offense, to prove that, at the time of the homicide, the accused was a convict;

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and the only error assigned is that the record does not show that he is the same Ernest Brown as the Ernest Brown who was convicted of a felony in Surry county and sentenced to a term of years in the penitentiary. The assignment of error is without merit. The accused was indicted as Ernest Brown, alias "Fern," and the indictment charged that he had been previously convicted of a felony in the Circuit Court for the county of Surry, and sentenced to a term of five years in the penitentiary, and that, at the time of the homicide, he was undergoing his punishment as a member of the State convict road force, at the camp in Orange county. In support of the charge of such conviction, the Commonwealth introduced a certified copy of the judgment and order of condemnation of "Ernest Brown, alias 'Fern'" from the Circuit Court of Surry county. The trial court certified the facts, not merely the evidence, established in the case, and, among them, "that Ernest Brown was, on the 1st day of March, 1921, in the custody of Walter E. Snow and D. N. Kyger, guards of the penitentiary of Virginia, working at a stone quarry in Orange county, Va.," and that the certified copy of the order of the Circuit Court of Surry county above referred to was "the paper under which the said Ernest Brown was held in the said custody and under which he was received into said camp as a convict." This abundantly identifies the accused as the convict under the judgment aforesaid of Surry county. The murder was fully proved, and is not here denied. It is plain that the judgment complained of must be affirmed.

Affirmed.

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BUTLER v. COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. CRIMINAL LAW.—Failure to Support Wife and Children—Agreement to Separate—Custody of Children—Evidence—Code secs. 1936, 1937.

Error to Corporation Court of city of Norfolk.

Reversed.

N. T. Green, for plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

KELLY, P.:

The defendant, L. C. Butler, upon appeal from a sentence of the Juvenile and Domestic Relations Court of the city of Norfolk, was tried by a jury in the Corporation Court of that city and found "guilty of willful neglect to support his two infant children, then in destitute and necessitous circumstances," the punishment being fixed at a fine of five hundred dollars. The court, having first overruled a motion made by the defendant for a new trial on the ground that the verdict was contrary to the law and the evidence, rendered judgment in accordance with the verdict; and to that judgment, this writ of error was awarded.

The warrant upon which the defendant was tried was issued upon the complaint and affidavit of Lillian Butler, wife of the defendant, and the charge was that "he did unlawfully and willfully neglect and refuse to provide for the support and maintenance of his wife and two infant children under the ages of ten years, they being then in destitute and necessitous circumstances." (Code 1919, secs. 1936, 1937.)

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It will be observed that the effect of the verdict was to find the defendant not guilty as to the alleged non-support of his wife. The further essential facts may be stated as follows:

Butler and his wife were married in 1917. For about a year prior to December 19, 1920, they lived in the city of Norfolk. Their two children at the time of the trial were, respectively, two and three years of age. There is some conflict of evidence upon the subject, but, taking it as a whole and making due allowance for some exaggeration of statement by both of the parties, it seems fair to say that prior to the last-named date, the defendant had provided for his wife and children about as well as his employment and earning capacity would permit. He had no regular avocation, and he was frequently out of work. During the periods when he was without anything to do, it was usual for his wife to go with the children to her father's home, in North Carolina. Occasionally they went with him to his father's home, in Virginia.

On the 9th of December, 1920, Mrs. Butler went to visit her father, and stayed about three weeks. She returned to Norfolk in January and remained with her husband for about ten days. He was out of employment at that time, and at the suggestion of his father he proposed to his wife that they go to stay with him until he could find work, but she preferred to go to her own people, and thereupon, by mutual consent and apparently without any quarrel or misunderstanding between them, she returned to her father's home, taking the children with her, to remain, as she testified, "until work opened up." On or about the 7th of March, the defendant succeeded in getting employment with a street car company in Norfolk at a wage of one dollar per day, and on the 9th of March he wrote to his wife that he had found some employment, and that he "hoped things would get along all right and things would soon be all right for her to come back after a while." This quotation is taken from his testimony, and the letter itself was not in-

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troduced. There is some uncertainty as to the exact contents of the letter, but she admits that he wrote her at that time with reference to his new employment, and it is perfectly clear that he expected her to return and bring the children to live with him as soon as his income would justify it. He had engaged rooms with this in view at the same boarding-house at which they had theretofore stayed.

On the 12th of March, Mrs. Butler, accompanied by her father, came back to Norfolk, got practically everything in the way of bed-room and kitchen furniture which they had theretofore been using, took these things away, and left without seeing Butler or attempting to see him. (She testified that these things belonged to her.) He was away from the house and at work at the time. She said on that occasion to Mrs. Bradshaw, his boarding-house keeper, that she would never live with him again. On March 31st, without communicating with him further, she procured the warrant in this case. At the hearing before the judge of the Juvenile and Domestic Relations Court she said again that she would not live with him, and repeated that statement on the trial in the corporation court. The defendant admits that he only sent his wife two dollars after she went back to her father's home in January, but he has always been willing, and is now willing, to take her and the children back to live with him and to support them as best he can.

The formal assignments of error rest upon the giving and refusing of certain instructions, but the petition upon which this writ of error was granted and the brief of the Attorney General are agreed that the substantial and controlling question for us to decide is whether, upon the evidence as certified, the judgment can be sustained.

In our view of the case, the question just suggested must be answered in the negative. A man is under legal obligation to support his children, and he may often be required to do so when they are not living with him, but he cannot be said to *wilfully* neglect and refuse to support them where

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his wife, without reasonable excuse, and with the acquiescence and aid of her father, keeps them away from him. The defendant, it is true, sent his wife practically no money after their agreed temporary separation, but he had, as she knew, very little money to send, and, so far as the record shows, there was every reason for him to suppose that the arrangement, pursuant to which they separated in January, was satisfactory to her, and that she and the children would return to him as soon as his income improved. Her unexpected conduct on the 12th of March, when she came and got the household and kitchen furniture and went back to her father's home with the declaration that she never intended to live with him again, finds no satisfactory excuse in the record.

In the case of *Mihalcoe* v. *Holub,* 130 Va. —, 23 Va. App. 263, 107 S. E. 704, we held that the duty of a father to support his infant children was a legal duty, but we further said in that opinion: "Where the child is living away from the father, the question of his liability will depend upon the circumstances of the case. If he abandons the child, or drives him from home, he is liable to any person who furnishes necessary support; but the person furnishing it must bear the burden of proving that there was an unjustified abandonment, that the support furnished was necessary, and that the credit of the father was, in contemplation of law, the basis of the advances."

Now, in this case, it is perfectly clear that neither the wife nor the wife's father could charge the defendant in a civil suit for the support and maintenance of the children. His duty to support them is based largely upon his right to their custody and control. To say the least of it, he has the right at common law to maintain them in his own home, and he cannot be compelled against his will to do so elsewhere, unless he has refused or failed to provide for them where he lives. These propositions are abundantly supported by authority. See *Mihalcoe* v. *Holub, supra,* and authorities cited therein; *Angel* v. *McLelland* (Mass.), 8

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Am. Dec. 118; *Baldwin* v. *Foster*, 138 Mass. 449; *Foss* v. *Hartwell*, 168 Mass. 66, 60 Am. St. Rep. 366; *Hyde* v. *Leisenring* (Mich.), 65 N. W. 536; *Shields* v. *O'Reilly*, 68 Conn. 256, 36 Atl. 249.

The statute under which this prosecution was instituted was not intended to change the common law with respect to the duty of a father to maintain and support his infant children, but merely to more effectually enforce the legal duty. Up to the time when the defendant's wife carried away the furniture, announced that she intended to break off relations with him, and went back to her father's home to stay, we discover nothing in the evidence to warrant the jury in finding that Butler was not acting in good faith and in reliance upon the mutual agreement pursuant to which she had gone home in January. That arrangement was voluntarily and wrongfully canceled by her, and she has been in default ever since. Notwithstanding all this, he appears to have been patient and hopeful, and said in his testimony that he simply waited after her unexpected trip in March, hoping that she would soon come back to him. He held the rooms which he had reserved, as above mentioned, for their joint use, until some time in May.

While it is quite true that upon these facts he is at this time entitled to the custody of the children, his failure to resort to legal process to bring them back from the State of North Carolina to his home in Norfolk affords no ground upon which to hold him liable for their maintenance and support. This latter proposition is expressly decided in *Baldwin* v. *Foster*, *supra*.

The authorities we have cited relate mainly to the civil liability of the father to the mother, or some third party, for necessaries furnished the children, and not to prosecutions under criminal statutes; but these authorities are conclusive as to the common law duty of the father, and we have no difficulty in holding that the Virginia statute cannot be so construed as to enable the wife upon the facts

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above recited to procure a conviction of her husband for a violation thereof, either as to herself or as to her children.

The judgment complained of will be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with the views herein expressed, if the Commonwealth shall be so advised.

Reversed.

CANADA, ET AL., *v.* C. H. BEASLEY & BROS., INC.

(*Richmond, March 16, 1922.*)

1. EQUITY—Cancellation of Deeds—Creditors' Suit—Homestead—Husband and Wife—Bankruptcy—Res Judicata—Inconsistent or Contradictory Positions—Code 1904, secs. 2414, 2460-a.

Appeal from Circuit Court of Halifax county.

Reversed.

Jas. H. Guthrie, for the plaintiffs in error.

Frank L. Thomasson and *Jas. S. Easley*, for the defendant in error.

KELLY, P.:

In essentials, the case is this: On September 12, 1917, R. C. Canada, a merchant, conveyed to his wife, Annie C. Canada, for a consideration expressed in the deed as "$10 cash in hand and the further consideration of love and affection," a certain lot on which was situated his storehouse and dwelling attached; and by the same conveyance he transferred to his wife his stock of goods and fixtures in the storehouse. This deed was duly recorded, either on its date or within a few days thereafter. There is a statement in the brief for appellee, and a suggestion in a question in one of the depositions in the case to the effect that the date of recordation was September 22nd, but according to the copy of the deed in the transcript before us, it was recorded on the 12th day of September, the day of its execution. The

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deed contained a condition subsequent, upon the happening of which all the property thereby conveyed would revert to R. C. Canada. Simultaneously with, or immediately after, the execution of the deed, by written contract of that date, Annie C. Canada "contracts and agrees to sell to the said R. C. Canada all of the merchandise in said storehouse which was formerly owned by the said R. C. Canada for the sum of $2,000, which sum is evidenced by a certain note of even date herewith drawn by the said R. C. Canada and payable to the said Annie Canada one year after date, with interest after maturity." There was, in fact, no valuable consideration either for the conveyance of the lot and buildings and stock of goods, or for the resale of the goods; and there was no actual transfer of the possession of the goods from Canada to his wife and, in turn, from her to him. He was in possession at the time of the execution of the above-mentioned deed and contract, and so remained, continuing his business as a merchant until February 20, 1918. Subsequent to September 12, 1917, and before the end of that calendar year, he purchased of C. H. Beasley & Bros., Inc. (appellee), various bills of merchandise, amounting in the aggregate to $623.48, and during the same period purchased other like bills from other parties, the whole of which, including the Beasley Bros. bill, amounted to $4,523.18. All of these purchases were made on credit extended solely to him in the regular course of trade, were evidenced by open accounts, and remained wholly unpaid when the petition in bankruptcy hereinafter referred to was filed.

On January 26, 1918, Annie C. Canada made a deed to R. C. Canada for an expressed consideration of "five dollars and other valuable considerations," whereby she (1) conveyed to him the lot and buildings aforesaid, and (2) recited the contemporaneous interchange between them of the title to the stock of goods as above set out, and then proceeded to "grant, release, and convey" to him "all of the stock of general merchandise and fixtures now on hand

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and contained in the storehouse aforesaid." This deed was duly recorded on January 28, 1918. On the 20th day of February, 1918, by a writing duly executed, R. C. Canada selected and set apart as his homestead exemption the aforesaid lot and buildings, valued in the homestead deed at $1,800.00, and certain articles of personal property valued therein at $184.75. This claim of homestead was recorded on February 21, 1918.

On the last-named date, February 21, 1918, R. C. Canada was adjudged a bankrupt upon a petition filed by him on the day before. In the schedule of assets filed in the bankrupt court he included the lot and buildings and personal property described in his homestead deed and all other property of every kind owned by him, but indicated in the schedule, conformably to the forms and practice in bankruptcy proceedings, his claim under the State law to the exemption already set apart by him under the homestead deed.

At the first meeting of the creditors, March 4, 1918, before the referee in bankruptcy, three appraisers were appointed for the estate, and William Leigh was named as trustee and took charge of the property. The appraisers subsequently valued the stock of goods at $2,800.00, fixtures and furniture in the store at $165.70, personal property in Canada's dwelling-house, $226.70, and real estate (lot and buildings aforesaid), $2,000.00; total, $5,192.40.

At the creditors' meeting on March 4th, mentioned above, C. H. Beasley & Bros., Inc., among others, appeared by counsel and filed its proof of claim for $623.48.

On March 27th, the trustee made his report, in which he recited, among other things, the conveyance of September 12, 1917, from Canada to his wife, and her reconveyance to him of January 26, 1918, and then said: "Under these circumstances the trustee has grave doubt as to whether the bankrupt's claim of exemption should be allowed. He has set apart the property in the foregoing schedule merely in the automatic performance of a ministerial duty. And

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he respectfully asks leave of the court to litigate the question of the bankrupt's right to said exemption, and to employ counsel to assist him in said litigation."

On April 3, 1918, Quinn-Marshall Co., one of the creditors, represented by the same counsel as Beasley & Bros., excepted to the allowance of the homestead exemption. The exception, however, was not based upon the ground indicated in the trustee's report as his reason for questioning the exemption, but on the ground that the property claimed in the homestead deed amounted in the aggregate to more than $2,000.00. The referee, on July 31, 1918, passed upon this exception, the only one made by any creditor to the allowance of the exemption, as follows:

"I am, therefore, of the opinion and decide that the trustee's report setting apart the homestead exemption should be, and the same is hereby, approved and confirmed. It is, therefore, ordered that the trustee deliver the property in his hands, if any there be, to the bankrupt in accordance with said report."

The stock of goods surrendered by the bankrupt, valued in his schedule at $3,000.00 and appraised at $2,800.00, was sold by the trustee for $2,025.53, Beasley Bros. & Co. claiming and being allowed its share therein as a general creditor of R. C. Canada.

The decrees from which this appeal was taken were rendered in a suit instituted in September, 1918, after all of the foregoing events and proceedings had transpired, by C. H. Beasley & Bros., Inc., "on behalf of itself and on behalf of and for the benefit of all other creditors of *Mrs. Annie C. Canada,* who may come into this cause and prove their claims and pay their proper share of the costs." After alleging the transactions between the husband and wife and the bankruptcy proceedings hereinbefore set out, and specifically showing that the complainant had proved its claim in the bankruptcy court and would share in the distribution of the proceeds of the estate to be therein distributed, the bill made the following allegations: "That

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Mrs. Canada's attempted retransfer of the stock of goods to her husband on September 12, 1917, was void by virtue of the provisions of section 2414 of the Code (1904); that the goods purchased as aforesaid by R. C. Canada after September 12, 1917, were purchased for Annie C. Canada and placed in the stock of goods owned by her, and therefore she became thereby liable to the creditors for the amount of said purchases; that her conveyance to him of the stock of goods by deed of January 26, 1918, was void because it was a transfer of merchandise in bulk without compliance with the terms of section 2460-a of the Code (1904), and that, therefore, under the statute, R. C. Canada became also personally liable along with his wife for the debt owed by the latter to the complainant amounting to $623.48, which, as stated in the bill, would be "subject to the credit of the amounts to be received upon the distribution to creditors of the assets of the estate of R. C. Canada in bankruptcy as above set out"; that the complainant, by reason of the above alleged facts, became a creditor of Mrs. Canada before she made the deed to her husband for the real and personal property therein described; and that the last-named deed was for a consideration not deemed valuable in law and was made to hinder, delay and defraud her creditors. The bill makes no attack on the deed of September 12, 1917, from Canada to his wife, but expressly relies thereon and avers that it "created in Annie C. Canada a *fee simple* title in the above-described house and lot," subject to the conditions therein named.

The prayer of the bill is that R. C. Canada and Annie C. Canada be made parties defendant; that the deed of January 26, 1918, be set aside and declared null and void as to the complainant and other creditors of *Annie C. Canada;* that the homestead deed of February 20, 1918, be likewise set aside and declared null and void as to the creditors of *Annie C. Canada;* that the property included in the homestead deed be sold or rented, and the proceeds be held by the court for the benefit of complainant and other creditors

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of *Annie C. Canada* "subject to the terms and conditions of the said deed from Canada to his wife bearing date September 12, 1917."

To this bill, R. C. Canada and his wife filed certain so-called exceptions and also filed their separate demurrers and answers, and, in addition thereto, R. C. Canada filed a plea of *res judicata,* this plea being based upon the bankruptcy proceedings hereinbefore set out. Evidence was taken in the cause, and the court entered the several decrees appealed from, the effect of which was to overrule the "exceptions," demurrers, plea of *res judicata,* and all defenses set up in the answers, and hold that Annie C. Canada was the owner of the property embraced in the homestead deed; that both Canada and wife were liable to the plaintiff, and that the lot and buildings embraced in the homestead deed should be sold and subjected to the payment of the complainant's debt.

There is no real merit in the appellee's position. It has realized every cent it could have obtained on its debt if none of the transactions between Canada and wife upon which it relies had ever taken place. Its claim was merely that of a general creditor of R. C. Canada without lien of any kind and without waiver of exemption, and not only is it true that no effort is being made in the pending suit to reach the property on account of any personal liability of R. C. Canada (the suit resting entirely upon the alleged indebtedness of Mrs. Canada), but the homestead deed under the facts of this case cut off the appellee's right to subject the real estate. The exemption, as above pointed out, had been claimed and duly perfected before any of the transfers involved in this suit had been attacked or challenged.

There is no substantial foundation for the contention that the transactions between Canada and wife operated to constitute Mrs. Canada a debtor as to purchases made by her husband after September 12, 1917. It is conceded that these purchases were made by Canada in his own name and

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solely on his own credit; and the evidence clearly shows that the so-called agreement to resell the stock of goods was made and accepted on September 12, 1917, and that R. C. Canada was then and thereafter continued in actual possession. Under these circumstances it would seem clear that neither section 2414 nor section 2460-a, Code 1904, in any way affected the title which R. C. Canada took under the contract, and that the clause in the deed of January 26, 1918, with respect to the stock of goods amounted to no more than a surplus and wholly unnecessary confirmation of the contract. (The debt of the appellee and the debts of the other creditors for whose benefit the appellee claims to sue were not in existence on September 12, 1917, and there is no contention that section 2460-a affected the resale as of that date.)

Should there be any doubt, however, about the soundness of the above answer to the claim of liability against Mrs. Canada, a conclusive answer is found in the course pursued by the appellee. It certainly knew, when its claim was filed in the bankruptcy proceedings, of the deed of January 26, 1918, recorded January 28, 1918, and that deed expressly recited the former deed and contract between Canada and wife. Counsel representing appellee filed in the bankruptcy proceedings on behalf of another creditor a certain exception hereinbefore recited to the trustee's recognition of the homestead, and this exception was overruled by the referee and no appeal from that ruling was taken. The trustee's report, calling specific attention to the deed of January 26, 1918, and expressing doubt, arising from its terms, as to the right of Canada to claim the exemption, was not excepted to on any ground by the complainant. Notwithstanding all this, the appellee, with full knowledge of the facts, elected to treat the entire property, real and personal, as belonging to R. C. Canada, and to assert its debt against him alone. Under these circumstances we have no hesitancy in holding that this creditor cannot now assume a different attitude, and claim that the property belonged to

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Mrs. Canada, and that the debt was due from her. "A party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact, or state of facts, which are inconsistent with each other or mutually contradictory." *C. & O. R. Co.* v. *Rison,* 99 Va. 18, 31.

The effort to hold Mrs. Canada as a creditor has, therefore, in any view, entirely failed, and this is conclusive of the whole case. The complainant is not seeking to set aside the deed of September 12, 1917, from Canada to his wife, but expressly relies thereon, and the sole purpose of the suit is to set aside the deed of January 26, 1918, from her to him, basing this effort solely upon the theory that Mrs. Canada is a debtor of the complainant. As we have just seen, she is not such debtor, and this destroys the foundation of the suit. There is an averment in the bill to the effect that R. C. Canada, by reason of his purchase through the deed of January 26, 1918, of the goods in bulk, became indebted by virtue of the provisions of section 2460-a, *supra,* for the debt upon which the complainant sues, but the only purpose of that allegation, as clearly shown by the context, was to justify the complainant's conduct in going into the bankruptcy case as a creditor of Canada and claiming its pro rata in the distribution of the fund realized from sale of the stock of goods which Canada had surrendered and which were being administered in that proceeding. The suit before us was aimed exclusively at Mrs. Canada and depended absolutely upon establishing a liability against her. The effort to show such liability having failed, no case has been made against her, and an order dismissing the bill is the only order which can properly be entered in the cause.

It is perfectly clear that in this proceeding, and under the allegations and facts above disclosed, the homestead exemption claimed and perfected by R. C. Canada and allowed to him in due course in the bankruptcy case, cannot be disturbed. There can be no doubt about the proposition

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that a court of bankruptcy has jurisdiction to determine the claim of a bankrupt to his exemption. This is expressly declared in sec. 2, ch. 11, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), wherein it is said that "courts of bankruptcy * * * are hereby invested * * * with jurisdiction at law and in equity * * * to determine all claims of bankrupts to their exemption." There may be some doubt as to whether this is an exclusive jurisdiction, but none as to the power of the court to determine the question, and when it is determined, then it is settled once for all and cannot be questioned in a collateral proceeding. See *In re Allen,* 134 Fed. 620; *McGahan* v. *Anderson,* 113 Fed. 115; 3 Remington on Bankruptcy 2868. The jurisdiction of the bankruptcy courts, however, does not extend further than the determination and allowance of the exemption. It had nothing to do with the enforcement of specific liens or other claims against the property paramount to the homestead. *Newberry Shoe Co.* v. *Collier,* 111 Va. 288; *Lockwood* v. *Exchange Bank,* 190 U. S. 294, 47 Law Ed. 1061.

It is not necessary for us to go in this case as far as did the learned judge of the District Court for the western district of Virginia in a very careful and instructive opinion in the case of *In re Allen, supra,* holding that section 191 of the present Constitution cannot be construed so as to invalidate a homestead exemption claimed in property fraudulently conveyed unless the conveyance of such property has been annulled by decree of court at the time the claim is asserted. It may be that the decisions of this court in *Dickenson* v. *Patton,* 110 Va. 5, and *Newberry* v. *Collier, supra,* are in conflict with this holding of the district court, although neither the *Dickenson Case* nor the *Newberry Shoe Co. Case* makes any reference to the *Allen Case.* But we have before us now a situation very different from that with which the courts were dealing in either of these three cases. In the instant case the transfers which are challenged had never been in any way questioned when

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the homestead exemption was claimed and set apart in the manner allowed by law, and the exemption was thereafter duly allowed, without challenge by the complainant, in the bankruptcy proceedings. Under these circumstances, we have no difficulty in holding that the complainant, if it ever had any right to assail the homestead, lost that right by its course in the bankruptcy court, and that the exempted property cannot now be successfully attacked except for the enforcement of some prior lien, or some claim paramount to the exemption.

For the reasons stated, we are of opinion that the decrees complained of are erroneous and should be reversed. An order will be entered in this court dismissing the complainant's bill.

Reversed.

DALEY *v.* COMMONWEALTH
and
MALES *v.* COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. BILLS OF EXCEPTION—Time for Signing—Date of Actual Entry of Order—Clerk's Memorandum—Code 1919, Sections 5962, 6252.

Error to Hustings Court of city of Portsmouth.

Affirmed.

S. M. Brandt and *R. T. Thorp, Jr.*, for the plaintiffs in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

PRENTIS, J.:

John Daley and A. P. Males have each been convicted of selling ardent spirits in violation of the statute. There

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are six errors assigned in the petition, but they are each based upon bills of exception which are not signed by the judge of the trial court. He refused to sign them because they were not tendered within sixty days from the date of the final judgment.

The statute, Code 1919, section 6252, is mandatory, and there being no exceptions in the record before this court, and no reversible error on the face of the record, the judgment of the trial court is presumed to be correct in every respect. *Bragg* v. *Justis*, 129 Va. 354, 22 Va. App. 298, 106 S. E. 335; *Harley* v. *Commonwealth*, 131 Va. —, 24 Va. App. 364, 108 S. E. 648.

There is a memorandum made by the judge to the effect that on the date of such final judgment, the order was not actually spread upon the common law order book of the court, but only a memorandum thereof made by the clerk in the minute book regularly kept by him in which to note the daily proceedings of the court. The fact that the order was not entered on the order-book and signed by the judge on the date of the judgment does not extend the time for the preparation and presentation of the bills of exception. It is not the practice in this State, and indeed it would be physically impossible, for the clerk to record all of the orders on the order-book immediately, or for the judge forthwith to sign them. The universal practice is that the clerk extends the orders upon the permanent record of the court just as soon as possible, and they are thereafter read in open court and signed as orders of the date when the judgments were pronounced. This practice is recognized by Code 1919, section 5962, which provides, among other things, that "the proceedings of each day shall be drawn up at large, and read in open court, by the clerk thereof, at the next session of the said court, except those of the last day of a term, which shall be drawn up and read the same day. After being corrected where it is necessary, the record shall be signed by the presiding judge."

Affirmed.

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DEARING, ET ALS., *v.* DEARING, ET ALS.

(*Richmond, March 16, 1922.*)

1. WILLS—Validity—Proof—Alleged Substitution of One Sheet of Will After Signed by Testator—Evidence—Undue Influence—Testamentary Capacity—Declarations of Testator.

Appeal from Circuit Court of Rappahannock county.

Affirmed.

Volney E. Howard, H. C. Featherston and *Chas. H. Keyser,* for the appellants.

Aubrey G. Weaver, for the appellees.

WEST, J.:

This suit involves a contest over the will of Alfred Willis Dearing, who died in Rappahannock county, Va., on September 9, 1916, in his eighty-ninth year, unmarried and without issue, leaving an estate valued at more than a half-million dollars.

His heirs at law are, the contestants, R. Alvin Dearing, William A. Dearing and Janie E. Dearing, nephews and niece, and Robert Scott Dearing, a grandnephew, and his five nephews and five nieces, to-wit: Eugenia Dearing, Alice Dearing, Eva Calloway and John Dearing, of Georgia; Alfred E. Dearing, of Tennessee; Eugenia Cox, of Amherst, Va.; J. A. Dearing, of Shenandoah Junction, W. Va.; W. G. Dearing, Eastham Dearing and Annie M. Dearing, of Rappahannock county, Va., the last ten of whom are named as sole devisees in the will.

On September 11, 1916, J. Alfred Dearing, a nephew, and the executor named in the will, produced the same in Rappahannock Circuit Court, and being proved by the testimony of Miss P. M. Dearing, one of the subscribing witnesses thereto, who also proved the due attestation of said will by J. C. Walter, the other subscribing witness thereto (the said J. C. Walter being unable to attend court and testify on account of sickness), the said paper writing was

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ordered to be recorded as and for the last will and testament of the said A. W. Dearing, deceased; and the said J. Alfred Dearing qualified as executor and took possession of the estate.

Subsequently, the contestants instituted a suit in chancery, attacking the validity of this will, and an issue *devisavit vel non* was directed therein, in which the defendants in the chancery suit were made plaintiffs and the plaintiffs therein (the contestants) were made defendants. There were three trials of this issue before three separate juries. Each of the first two trials resulted in a hung jury, and on the third trial the plaintiffs (the propounders of the will) demurred to the evidence and the jury found against the will, subject to the decision of the court on the demurrer to the evidence. The court sustained the demurrer to the evidence and entered judgment accordingly, and also entered a decree establishing said paper writing as the last true will and testament of the said A. W. Dearing; and this is the judgment and decree complained of.

On the trial of the issue of *devisavit vel non,* the contestants filed the following grounds of defense:

1. They deny that the typewritten instrument, bearing date on May 29, 1916, signed with the name of A. W. Dearing and admitted to probate in the Circuit Court of Rappahannock county on September 11, 1916, is the true last will and testament of the said A. W. Dearing, and they require strict proof thereof.

2. The said alleged will was not properly and legally executed and attested.

3. The said alleged will was procured by fraud and undue influence on the part of J. A. Dearing, named in said instrument as executor, aided by members of the household wherein the said A. W. Dearing died.

The evidence will be considered under the rule applicable to a demurrer to the evidence, this rule being that if the

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evidence be such that a jury *might* have found a verdict for the demurree, the court *must* give judgment in his favor. Burk's Pl. & Pr., p. 495, sec. 263.

Has the will been proven in the manner prescribed by law?

J. C. Walter, one of the attesting witnesses, testified substantially as follows: That he resided at Huntley, and was not related to A. W. Dearing; that he was informed by J. A. Dearing that A. W. Dearing wished to see him in his room; that when he entered the room, A. W. Dearing was standing in the floor with the paper in his hand, and said: "This is my will, and I want you and Cousin Pat (Miss P. M. Dearing) to sign it"; that A. W. Dearing signed the will in the presence of both witnesses, and they signed it as witnesses in his presence, all three being present together at the same time; that testator directed witnesses where to sign, and was of sound mind at the time; that the will was written on two sheets of paper, and that the will shown witness in court was the same paper testator said was his will; that witness did not read the will or know what it contained; that P. M. Dearing, the other subscribing witness, was dead.

While it is generally true that a will cannot be established upon the uncorroborated testimony of a non-attesting witness, yet in the instant case, the will having been proven by one of the attesting witnesses, the testimony of J. Alfred Dearing, in denial of the charge that he had supplied the first sheet of the will, after it was signed by the testator, should be considered in corroboration of the testimony of such attesting witness, and in determining the genuineness of the will.

The circuit court had before it the will, the same being also filed with the record here, which is written upon two sheets of paper fastened together by two clamps, a small one made of thin brass and the other of steel. The uncontradicted evidence of J. A. Dearing is that the latter was put on by Mr. Weaver, in the office of Downing & Weaver, at the time the will was sent to them for inspection; that

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the first sheet was attached to the second when the testator signed the will, and that the will was afterwards returned to the testator and remained in his possession for several weeks.

While it is the better practice where a will is written on more than one sheet of paper to have the testator sign each sheet, yet this is not necessary to the validity of the will. Nor does the law require attesting witnesses to sign each sheet or acquaint themselves with the contents of a will before signing the same.

The testimony of the witness Walter bears the impress of truth, and when considered with the other facts shown in evidence, as above stated, and with the record of the probating of the will before the circuit court, upon the testimony of Miss P. M. Dearing, the other subscribing witness, leaves no room for doubt that the paper writing shown the witness is, in all respects, the paper writing signed by the testator and by said Walter and P. M. Dearing as attesting witnesses, and that the proponents, in the absence of evidence to the contrary, were entitled to have the said writing admitted to record as and for the last true will and testament of A. W. Dearing, deceased.

In *Palmer* v. *Owen* (Ill.), 82 N. E. 275, it is said: "It is well established that a will may be made up of several sheets of paper, and they need not be fastened together." *Wykoff's App.*, 15 Pa. 291, 53 Am. Dec. 597; *Barnewell* v. *Murrell*, 108 Ala .366, 18 So. 831; *Ela* v. *Edwards* (Mass.), 16 Gray 91; *Harp* v. *Parr*, 168 Ill. 469, 48 N. E. 113.

In *Young* v. *Barner*, 27 Gratt. (68 Va.), at p. 106, this court said: "If the witnesses to the will are dead, or if there is a failure of recollection on their part, the court will often presume (the will being in other respects regular) that the requirements of the statute have been complied with in the formal execution of the instrument. Such presumptions are absolutely essential to the protection of property and the security of titles. Were it otherwise, the most important and solemn instruments would often fail to take

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effect by the death, or from the mere failure of attesting witnesses (real or assumed) to recall each and every formality presented for the execution of testamentary papers."

In *Palmer* v. *Owen, supra,* it is also said: "Counsel for appellants say the sheets upon which the will was written were not all uniform in texture and finish, and from these circumstances, and the further fact that the witnesses to the will were unable to identify every sheet of it as being the same paper the testator signed and they witnessed as his will, it is contended probate should have been denied because they say the proof does not show that the instrument sought to be probated is the whole instrument acknowledged and executed by the testator as his will. It is true, as counsel contended, that it is possible where a will is written on separate sheets of paper, loosely fastened together, that one or more sheets might be removed and others substituted, but the possibility of this being done is not sufficient to justify denying the admission of a will to probate. It is not necessary to the validity of a will that it should be all written on one sheet of paper. All that is required is that the whole will shall be in the presence of the witnesses when attested by them. *Harp* v. *Parr,* 168 Ill. 459, 48 N. E. 113. Neither is it required that the witnesses to a will should read it or examine it with such care as to be able, upon application to admit to probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by the testator and attested by them."

In Page on Wills, at section 372, the author says: "In view of the principles already laid down, it is evident that the forgetfulness of the accessible subscribing witness, as to certain necessary facts of execution, does not avoid a *prima facie* case made out by proof of the genuineness of the signature of the testator and the subscribing witnesses. So, where the subscribing witnesses identify their signatures, but have no recollection of having attested the instru-

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ment, or the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary."

In 40 Cyc. 1093, it is said: "A will need not be written entirely on one sheet of paper, but may be written on several sheets, provided that the sheets are so connected together that they may be identified as parts of the same will. Connection by the meaning and coherence of the subject matter is sufficient, as physical attachment by mechanical, chemical or other means, is not required, although sufficient when made."

The proponents having made out a *prima facie* case, the contestants seek to defeat the will by proving it was procured by fraud and undue influence. They offer no direct evidence, but rely solely upon circumstances, inferences and presumptions. Among the circumstances on which they rely may be mentioned the following:

(a) That the testator was taken to Huntley and denied visitors.

A. W. Dearing was never married, and lived alone in Rappahannock county, and the Huntley home was the only other Dearing home in the county. When he was taken with his final illness, his friend, Joseph Reid, advised him to go to Huntley, and he finally consented and went.

His attending physician, Dr. Kipps, gave instructions to keep him quiet and not allow him to have company, and says he is responsible for the action of the nurse in refusing admittance to visitors. While these instructions were in force, several of his friends called but were not permitted to see him. Later, when his condition was improved, several of them were allowed to see him. There was nothing unusual in the course pursued by the attending physician in his case.

(b) That the will was privately executed and witnessed by members of the Huntley household.

A. W. Dearing had accumulated a very large estate, and, like most successful business men, preferred to keep his

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business, as far as possible, from the public, and executed his will in the presence of a few friends, as most people do. When it was suggested that one Mattox be called to witness his will he objected, stating that he did not want the impression to get out that he was about to die. It is a tribute to the honesty and integrity of the members of the household at Huntley, against whom the charge of fraud has been hurled by the contestants, that not one of them will receive, under the terms of the will, one dollar more than their cousins in Georgia. In fact, the heirs of John Dearing residing in Georgia and Tennessee receive exactly one-half of the entire estate, while J. A. Dearing and his two sisters receive less than one-third.

(c) That no lawyer wrote the will, or was consulted about it, and that J. A. Dearing was the draftsman, beneficiary and executor.

Comparatively few people employ lawyers to write their wills, and it is not surprising that a man of A. W. Dearing's business sagacity and disposition to economize should have pursued this course. He did, however, after it was executed, submit the will to Downing & Weaver for their approval.

John H. Jenning, a disinterested witness, testified that he had known the testator for a long time and had transacted much business with him; that in 1915 he spent the night in his home and something was said about Downing & Weaver, and the witness said: "I reckon they will settle up your estate after you are gone; they know a good deal about your business," and he said: "No, there is a man who knows a good deal more about it than they do," and he said it was his nephew, and witness asked which one, and he said, "the one that was at Shenandoah Junction; that gentleman over there at your right."

John M. Johnson, who has no interest in this suit, testified that Mr. Dearing was an old friend of his and spent the night at his home about two years before his death, as he often did, and he got to quizzing him as to who would be

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his administrator, and said to him, "Mr. Downing and Mr. Weaver will administer your estate," and he said, "No, I think there is brains enough in the Dearing family to administer it," and indicated that he preferred Mr. Alfred Dearing, on account of his health, as he was delicate and was competent.

It is true that J. Alfred Dearing is a beneficiary under the will, but if, as charged by the contestants, he has perpetrated a fraud on his testator by supplying the first sheet of paper constituting the will, after it was signed by the testator, it seems strange indeed that he did not make a larger provision for himself and sisters instead of providing that they receive one-tenth each, the same received by each of the other devisees. The contestants admit the genuineness of the second sheet, and it is on this that he is named as executor. It is unbelievable that a man would commit a forgery when no advantage could thereby accrue to him or his people.

The case of *Coffin* v. *Coffin* (N. Y.), 80 Am. Dec. 225, is parallel with the case at bar. At page 238 the court says: "The circumstances that the nephew, who prepared the will, was appointed one of the executors and is also one of the legatees, has been urged upon our consideration. Facts of this kind may, and do often, very justly excite the suspicion of courts when fraud and undue influence are alleged; but it is not a rule or principle in the law of testaments that the draftsman of a will cannot be an executor, or cannot take a benefit under it. As men quite generally appoint some of their kindred to be their executors, the choice in the instance before us does not seem to be an unnatural one. Indeed, there would be some difficulty in suggesting a different choice in the actual circumstances and relations of the testator. In respect to the legacy or portion given to A. H. Coffin, the draftsman of this will, we find it so moderate in amount, and in such just proportion to the sums given to the nine other persons standing in the same relation to the testator, as to afford no ground for invalidat-

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ing the instrument or any part of it. As I have observed, there is no rule of law which prevents a person who prepares a will from taking a legacy under it. In the language of Baron Parke, in *Butlin* v. *Barry*, 1 Curt. Ecc. 637, 'All that can be truly said is, that if a person, whether an attorney or not, prepare a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight, according to the facts of each particular case; in some, of no weight at all, as in the case suggested varying according to circumstances; for instance, the *quantum* of the legacy, the portion it bears to the property disposed of, and numerous other contingencies."

The testamentary capacity of the testator being shown by the uncontradicted testimony of a number of witnesses, including three physicians, the inquiry is as to his mental make-up. Was he easily influenced by others? On this point, the witnesses, with one accord, testified that he was a man of strong purpose of mind, did his own thinking, and was not easily susceptible to influence from others.

The law as to what constitutes undue influence has been very clearly stated in *Wood* v. *Wood*, 109 Va. 470, 3 Va. App. 172, where Harrison, J., speaking for this court, says: "Before undue influence can be made the ground for setting aside a deed or will, it must be sufficient to destroy free agency on the part of the grantor or the testator; it must amount to coercion—practically duress. It must be shown to the satisfaction of the court that the party had no free will, but stood *in vinculis;* and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence."

On the question of undue influence, Schouler on Wills (5th ed.), sec. 239, reads as follows: "As to undue influence in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in questies lies still on the party who alleges it, either by direct proof or circumstances inconsistent with fair dealing. * * * 'In order to set aside the will of a person of sound mind,'

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observes Lord Cranworth, 'it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis.'

"Hence it is, that isolated and disconnected circumstances are not permitted to outweigh the usual presumption that a person of intelligence and capacity who executes a will does so without imposition or undue influence. Thus the simple fact that the later will modifies an earlier one in favor of one who drew it up is held insufficient to overcome such a presumption, or generally that the testator's draftsman, or one whose advice was sought by him, was made executor or receives a legacy under the will."

It is accepted as the law in all jurisdictions that forgery, undue influence and fraud in obtaining the testator's signature to a different instrument from that which he intended to sign, are offenses too grave to be lightly inferred from circumstances which are capable of innocent construction.

There was introduced in evidence a paper writing designated as the "pencil will," dated January 14, 1914, written and signed by A. W. Dearing, in pencil, whereby all of his bonds, notes and evidences of money due him were assigned to A. E. Dearing and J. A. Dearing, trustees, for the purpose of an equal distribution "between my five nieces and my five nephews."

The uncontradicted testimony of J. A. Dearing is to the effect that A. W. Dearing asked him to come to his home, witness thought to look over some bonds. When he arrived, A. W. Dearing showed him the pencil-written will and said that was the way he wanted his property to go, but he was going to eliminate Alfred E. Dearing as executor, because he had shown himself unfit to handle his own money, and he could not handle his; and testator handed him the pencil will and said, "Put it in type." J. A. Dearing took the pencil will home with him and returned later with the will

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he had prepared, which is the will dated May 29, 1916, which was signed by the testator. When this will was executed, A. W. Dearing destroyed the pencil paper, handing the fragments to J. A. Dearing rather than throwing them on the floor. The latter advised him not to destroy the pencil paper, as it was his own handwriting and showed his desire in the distribution of his estate. J. A. Dearing kept the fragments and later pasted them together on another piece of paper. The witness is under the impression that the pencil paper included the real estate, and from an inspection of this paper it appears there is ample vacant space caused by the missing pieces of paper to include the word "lands." This paper shows that it was A. W. Dearing's intention to give all his property to his five nieces and five nephews. And Mrs. Eva Calloway, daughter of John Dearing, deceased, of Athens, Ga., testified that she visited her uncle, A. W. Dearing, in 1908, and he told her that W. A. Dearing, of Amherst, the father of the contestants, was the only one of his relatives who had ever "used profanity towards him," adding that *his* children would never receive any of his property. Mrs. Calloway also testified that she visited A. W. Dearing about one month before his death, and says: "He told me he had spent considerable thought upon the disposition of his land; that he at first considered leaving the land to his five nieces and nephews who live in Virginia, and making up—of course, I don't remember his exact words—making up the difference in the value of the land to the Georgia Dearings in money, or giving the value of the land to the Georgia Dearings in money; then he said, 'but I finally decided to divide the land equally between my ten nieces and nephews, and then you can do as you please with it.' "

She also testified that he said to her: "I have divided my property equally among my ten nieces and nephews; when you go home, tell your brothers and sisters what I have done."

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The contestants also rely on certain declarations of the testator made before the date of the will, and many of them several years before, to the effect that the law made a good will or a better will than he could make. Such evidence can have little, if any, weight in the determination of the matter at issue here, as the contestants admit that a will was made, but claim that the first sheet of the will is a forgery.

In the case of *Samuel* v. *Hunter's Ex'or*, in which the declarations were made after the will was executed, this court, speaking through Kelly, P., said: "The authorities are not in accord on the subject, but we are of the opinion that the rule supported by the better reason and authority is that such declarations, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will; but that in all cases where its genuineness has been assailed by other proper evidence, the declarations are admissible as circumstances, either to strengthen or to weaken the assault, according to their inconsistency or harmony with the existence or terms of the will. This is the settled rule in England and is well supported by authority in this country." *Samuel* v. *Hunter's Ex'or*, 122 Va. 636, 15 Va. App. 308.

J. Alfred Dearing, the executor, was evidently held in high regard by his uncle, the testator, as the latter frequently sent for him to come to his home and list his notes and bonds, and the uncle's books showed numerous entries in Alfred's handwriting. The selection of this nephew to keep his books and act as executor of his will was but natural, as J. Alfred Dearing was a man of education—a graduate of the V. M. I., at the head of his class, and winner of the Jackson-Hope medal. To his credit, the contestants have failed to produce any evidence which reflects upon his character or his integrity.

A careful examination of the evidence reveals nothing which would warrant a jury in finding that the paper writ-

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ing bearing date on May 29, 1916, shown in evidence, is not the true last will and testament of A. W. Dearing, deceased.

The judgment of the circuit court sustaining the demurrer to the evidence and its decree establishing said will are plainly right, and will be affirmed.

Affirmed.

DICKERSON v. COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. CRIMINAL LAW—Murder—Proof of Guilt of Accused—Sufficiency of Evidence—Statement of Attorney for the Commonwealth—Refusal to Instruct Jury to Disregard.

Error to Circuit Court of Halifax county.

Reversed.

M. B. Booker, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

The verdict in this case found the accused guilty of murder in the second degree and fixed his punishment at ten years in the penitentiary. The judgment under review was entered accordingly.

The deceased, a white man, named Will Rickman, was murdered on the night of Saturday, March 19, 1921, in a most brutal manner. There were two wounds, both of which, according to the testimony for the Commonwealth, were mortal wounds, if inflicted while Rickman was living —one consisting of a fracture of the skull about one and a quarter inches in length on the right side of the head above the ear, and the other consisting of the fracture of the spine on a level with the hip bones, the skin being scraped off at this place in the center of the back, making an abrasion underneath the clothing of the size of a half-dollar.

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In addition to these wounds, there was laceration about the lips, the right corner of the mouth was cut; there were marks of the teeth on the inner surfaces of the lower and top lips, one tooth broken, one missing; there was laceration back of the right ear, about half an inch in length; and there were a number of bruises on the forehead about an inch long, some distance apart, running up and down the forehead. The testimony of the physician, who examined the body as a member of the coroner's jury on the next day after the murder, concerning the appearance of the wounds, is to the effect, that of those on the head and face, "some looked like they were caused by a blunt instrument and some with an instrument that had a sharp point to it"; that the wounds on the face and head could have been caused by a pistol such as the pistol in evidence belonging to the accused; that the bruises on the forehead might have been made by the butt-end of that pistol, and the fracture above the ear could have been made by the hammer of the pistol; and that the wound in the back, causing the fracture of the spine, could have been caused by a blunt instrument, such as the club in evidence, which was found at the place at which, according to the theory of the Commonwealth, the murder was committed. This witness testified further, however, that he could not say that the wounds on the face and head were made by the pistol; that there was nothing about these wounds that indicated to the mind of the witness that they were made by the pistol; that they could have been made by some other instrument; and that he could not say that the lick which fractured the spine was hit by the club in evidence. And the evidence fails to disclose that there was any blood-stain on the pistol or club, or other evidence that either of them was an instrument used by the murderer.

The body of the deceased was found lying in the public road "right across one of the tracks made by vehicles." The witness for the Commonwealth, who testified to first seeing the body, was in an automobile with some young ladies, returning from a dance. One of the young ladies was driving the car. This witness, as the car passed along

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the road, saw in the road what afterwards proved to be the body of the deceased. As to the time of night when this occurred, this witness testified as follows:

"Q. Will you please state to the jury what hour that was that you saw that body?

"A. It was about quarter after twelve.

"Q. That was fifteen minutes after twelve o'clock?

"A. Yes, sir.

"Q. State to the jury how you arrive at that?

"A. I left down the road about four miles, at Mr. Tracey's, about twelve o'clock, and I think it took about fifteen minutes to drive it.

"Q. It certainly would not take over fifteen minutes to drive it?

"A. No, sir.

"Q. It is good gray soil road?

"A. Yes, sir.

"Q. And no hills between the two points?

"A. No, sir.

"Cross-Examination.

"Q. Did you look at your watch when you left Mr. Tracey's?

"A. Yes, sir.

"Q. After you left or before?

"A. I got in the automobile and looked at my watch.

* * * *

"Q. One of the young ladies was driving?

"A. Yes, sir.

"Q. And she was driving it slowly?

"A. Yes, sir.

"Q. She was not an experienced driver?

"A. I think she was.

"Q. She was not driving fast?

"A. She was not speeding.

"Re-Direct Examination.

"Q. You are satisfied that it was not later than 12:15 when you reached that point?

"A. Yes, sir."

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Another witness for the Commonwealth testified that, traveling in an automobile, he passed, what afterwards proved to be the body of the deceased lying in the road, between 12:15 and 12:20 o'clock of the night of the murder. That he did not recognize it at the time as the body of any person, and did not stop, but saw something in the road which afterwards proved to be the body of the deceased.

Another witness for the Commonwealth, on cross-examination, but without objection on the part of the Commonwealth's attorney, testified that he had a conversation with one John Medley the next morning after the murder, and that Medley said that he thought he, Medley, ran over the body of the deceased the night before, and thought at the time that he, Medley, had killed the deceased.

It appears from Medley's testimony, who was a witness for the accused, that Medley was traveling in an automobile truck that night, and left the home of Jim Coleman, presently to be mentioned, which was about a mile from the place in the road where the body was found, not earlier than 12:15 o'clock, so that if his automobile struck the body of the deceased as it lay in the road, this must have been some time not earlier than about 12:30 o'clock of such night. Medley, however, was not asked any question about running over the body of the deceased, and did not testify on that subject.

The coroner's inquest was held the morning following the murder, which was Sunday, at the place in the road where the body was found, the inquest beginning about ten o'clock that morning. Before the coroner's jury met, however, the news of the murder and of the finding of the body had gone abroad in the neighborhood, and a considerable crowd gathered about the place where the body lay in the road and around about the body. There is no direct evidence on the subject of whether the body was or was not moved by any one during the morning before the coroner's jury convened.

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When the coroner's jury met, the body was lying in the road, as aforesaid, on the back, the right arm being flexed and partially across the chest. A tooth and an empty pistol cartridge were found near the body. A bottle of extract of pineapple was lying on the chest of the body, and a pint bottle of whiskey, about two-thirds full, was setting up under the right arm of the body. There was no blood in the road near the body, except that when the coroner's jury raised the head in their examination of the body, some bloody serum ran out of the nostril on the same side on which the skull was fractured. And the testimony for the Commonwealth was to the effect that one of the wounds was near an artery, which ordinarily would have bled considerably, and that if the deceased had been killed where the body was found in the road there would have been evidence of blood in the road from the wounds on the head.

The dwelling-house of Jim Coleman, a colored man, is located on the south side of the public road above mentioned, about seventy-five yards off from the public road. This dwelling-house is about one mile east of the place where the body was found.

On the Saturday night of the murder there was a dance, and what the colored people call "a party," at the house of Jim Coleman, and a large gathering of colored people were there, of men and women, beginning about 8:30 or nine o'clock that evening and breaking up about one o'clock that night. There was the selling of food and drink, and, according to the testimony for the Commonwealth, the accused, who occupied a room in Coleman's house, as a lodger, was selling intoxicating liquor that night, sometimes in one of the rooms of the house, and at other times in the yard at the rear of the house. Jim Coleman, assisted by others, was selling food from time to time. The house could not hold the crowd, and many were on the outside of the house, here and there in the rear, on the sides and in front of the house, while the party was going on.

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The testimony for the Commonwealth is to the effect that about 10:15 o'clock on the night mentioned, the accused was seen in the public road in front of Coleman's house; and that later, about eleven o'clock, the deceased (the only white person who appears to have been at the house of Coleman that night), was seen to come, in a somewhat drunken condition, from one side of Coleman's house, as if coming from the rear of the house, and, as he walked out towards the front of the house, the accused engaged in conversation with the colored men, Davis and Wood, who were afterwards among the witnesses for the Commonwealth, during which conversation the deceased said: "Some one has been meddling with me" (according to Wood's testimony); "Some —— of a —— is picking at me" (according to Davis' testimony). Neither Wood nor Davis asked, nor did the deceased say, who was "picking at" him or "meddling with" him. Davis assured the deceased that nobody should bother him while he was with him (Davis). The deceased asked Davis if the latter had any whiskey. Davis said, "No." The deceased then said: "I have some here, and I want to get some to go with it to make it better." Davis said that he didn't have a drop. The deceased then said that "the whiskey he had was not any good," but that if Davis would go with him out to the public road he would give Davis a drink, and also extended the same invitation to Wood. On getting out to the public road, just in front of Coleman's house, the deceased, Davis and Wood were seen by Harry Crute, a white man, who was passing along the public road at the time in his automobile, going homeward, which was eastward along such road. Crute stopped his car and talked a few minutes with the deceased, Davis and Wood. Thereupon, two other persons coming up, the deceased, Davis and Wood, asked Crute's permission to ride down the public road with Crute, and did so, to a point in front of Bethel Church, a distance of some fifty yards east of the entrance to Coleman's house.

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There the deceased, Davis and Wood got out of Crute's automobile and Crute went on homeward. This occurred, as Crute, a witness for the accused, testified, at "a few minutes past half-past eleven" o'clock. Crute fixes this time by saying that when he drove up in front of Coleman's house and stopped, as above stated, he looked at his watch and that it was then 11:30 o'clock; and that it was a few minutes thereafter that he left the deceased, Davis and Wood in front of the church.

Davis and Wood, witnesses for the Commonwealth, as aforesaid, testified that on getting out of Crute's automobile in front of the church, the deceased gave them each a drink of whiskey. Davis says the deceased gave them their drinks out of a quart bottle, which was about half full of liquor at the time. These witnesses further testified that they and the deceased then walked back along the public road to the entrance to Coleman's house, and that at that place they parted with the deceased, the latter going on westward along the public road in the direction of his home and of the place where his dead body was seen in the road within a short time afterwards, and Wood and Davis returning to Coleman's house, from which they not long afterwards departed for their own homes. These witnesses also testified that when they parted with the deceased, as last stated, they saw no one else in sight; met no one, saw no one, and heard no one else, and "heard no difficulty" occur as they went on to Coleman's house. Their testimony as to the time of night when this parting with the deceased occurred is in accord with Crute's testimony, and fixes such parting at about 11:45 o'clock.

The testimony for the Commonwealth developed the following, among other, facts:

When the body of the deceased and its surroundings were being examined at the inquest, a track on the ground, made by the toe of a shoe with nails in it, was noticed just under one of the arms of the dead man. Outside of the trampling in the road of those who had stood or walked around the

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body, tracks were found and followed which were the same as the track just mentioned. These tracks led from the body to Jim Coleman's house. He was found with shoes on his feet which made the tracks which led from the body to his house. He was asked if he had been to the place where the body was, and he denied that he had been there and denied all knowledge of the cause of the death of the deceased and of who killed him.

Coleman was, thereupon, arrested and lodged in jail that same day—Sunday, March 20, 1921—charged with the murder. That night an armed mob attacked the jail, and, not succeeding in breaking in, called to Coleman and demanded that he tell them who murdered Rickman. Coleman told them that he did not know who committed the crime. The mob then fired a number of shots at or near Coleman, then paused and said to Coleman that they didn't believe that he killed Rickman, but that they did believe that he knew who did, and that if he didn't tell them who it was they would kill him. Thereupon, Coleman again declared that he did not know who killed Rickman, and did this repeatedly. The mob then left the jail and, going to Coleman's dwelling-house, burned it to the ground and all of his property there.

Coleman was then—on the next night, being Monday night—removed to the jail at Lynchburg for safe-keeping, and was kept confined there for some time. Subsequently, he was brought back to, and kept confined in, the local jail, where he was still so confined and still charged with the murder at the time he testified on the trial of the accused. Meanwhile, a number of other colored men who were at the party at Jim Coleman's or were seen out in the public road on the night of the murder (including the accused, Wood and Davis, above mentioned, and others) were under arrest and confined in jail, charged with the murder; and the county had a detective employed, who, as well as the Commonwealth's attorney and the sheriff, and a Mr. Bailey, in whom Coleman seems to have had especial confidence, had

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interviews from time to time with Coleman, and also with others under arrest and not under arrest, some of whom were afterwards used as witnesses for the Commonwealth, quizzing them on the subject of who committed the murder. The evidence makes it plain that during this time those who were quizzing Coleman repeatedly impressed upon him the predicament in which he stood and would stand when he came to be tried upon the charge against him of having committed the crime of the murder unless he should, prior to his trial, name some one, other than himself, who wore his shoes which made the tracks aforesaid the night of the murder, and unless he should furnish some proof pointing to some one else as the person who committed the crime. Nevertheless, Coleman repeatedly denied to those who quizzed him all knowledge on the subject of who killed the deceased until he (Coleman) was brought back from Lynchburg to the local jail and was being again confined there and the time was approaching when he would be tried for the crime. Coleman then, on April 20, first, either to the Mr. Bailey above referred to, or to the detective (the record leaving it in some doubt to which, in the first instance), and afterwards in the presence of the Commonwealth's attorney and others, and subsequently upon the witness stand as a witness for the Commonwealth on the trial of the accused, made the statement which charged the accused with the crime, the material portions of which statement are as follows:

Coleman said that the shoes which made the tracks aforesaid were his every-day shoes. That on the night of his dance or party, he took them off and left them in the shed-room of his house, which was one of the rooms on the first floor of the house. That he wore that night, while the party was going on, another and lighter pair of shoes. That he went into the shed-room between ten and twelve o'clock that night, and the lamp was burning and the shoes of the accused, George Dickerson, "were setting with the toes that way" (indicating), and that he, Coleman, looked and said:

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"Uhm! good Lord." That the accused's shoes were standing there and Coleman's shoes were gone. That the next time he, Coleman, saw the accused, the latter came to the front door and said: "Uhm! you all here dancing," and Coleman said, "Yes." That thereupon the accused danced "from the door clean into the kitchen and asked Miss Chappel to have a treat" and also offered Coleman a treat. That "a good while after that," he, Coleman, heard the accused "talking between the stable and the house." That he, Coleman, was then standing in his kitchen door and saw the accused and two other persons, whom he did not know, standing with their backs to him, Coleman. That he, Coleman, recognized the accused by his voice. That the accused said: "Somebody is dead." That he, Coleman, said: "What do you say, George; who is that dead?" That the accused said "nothing" and the three walked away. The statement of Coleman, as given on the trial of the accused, thereupon continued as follows:

"Q. When was the next time you saw (the accused)?

"A. The next time I saw George he came up to the kitchen door. After he said that, he came up to the kitchen door, and I was standing there, and I went and looked. At the kitchen door I stopped and I said: 'George,' and he looked at me. I said 'George, who is that you say is dead *up the road?*'" (Italics supplied.) "He didn't say nothing. I said: 'George, who is that dead *up the road?*'" (Italics supplied.) "I said: 'George, what did you wear my shoes for? Didn't you wear my shoes *up the road?*'" (Italics supplied.) "And he said, 'Yes.' I said: 'Who is that dead *up the road?*'" (Italics supplied.) "And he looked in my face, and he said: 'I killed a man.' I said: 'George, Lord what do you mean? when I had my dance, and you wore my shoes,' and I said: 'What did you want to kill a man for?' and he said: 'Because I am so God damn evil!'"

* * * *

"Q. Did he tell you the name of the man?

"A. No.

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"Q. He said, when you asked why he killed the man, because he was so God damn evil?.

"A. Yes, sir.

"Q. When did you hear the news of the body being found up there?

"A. Between two and four o'clock.

"Q. How did you find it out?

"A. Riley Street came back on the mule.

"Q. Did you all go up there that night?

"A. No, sir.

"Q. Who went there?

"A. Myself and George went up there on my buggy with that little Roane horse of mine hooked to it.

"Q. You all went up there where the body was?

"A. Yes, sir, between eight and nine o'clock.

"Q. Did you all have any conversation coming back?

"A. Coming back, he spoke: 'Uhm! uhm! it's a pity; that man is dead. I wish I did know who killed him.' I didn't say anything until we got the other side of Mr. Luke Anderson's, and I said: 'George, what made you want to wear my shoes off last night?'

"By the Court: Talk a little louder.

"A. I asked him what he wanted to wear my shoes for, and he didn't say a word, but cast his eyes in the foot of the buggy. I said: 'George, it's a pity you wore my shoes last night and this man got killed last night.' He didn't part his lips, and I didn't part mine. * * *"

* * * *

"Q. Why did you tell people you didn't know, when you knew it was George?

"A. Because he told me to keep my mouth shut.

* * * *

"Q. Did he say anything about wearing your shoes off after you were arrested and in jail?

"A. Yonder in Lynchburg.

"Q. What did he say?

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"A. I got to a crack where I could peep in the cell and I said: 'George,' and he said: 'Huh!' I said: 'George, what did you wear my shoes off the night I had that dance?' and he dropped his head and never said a word, only to keep my damn mouth shut.

"Q. Was there anybody present when he said that?

"A. Yes, sir; Daniel Harris was in the cell with him.

"Q. Did he say anything else to you in this jail about this case?

"A. Yes, sir.

"Q. When was that?

"A. The Sunday he got out on bail he told me everything was all right; to keep my mouth shut; that everything would come out all right.

"Q. When was that?

"A. That was the same Saturday that they brought us back here to Houston from Lynchburg.

"Q. At the time he was turned out of jail, did you see him any more after that?

"A. Yes, sir.

"Q. When was it?

"A. If I am not mistaken, he came back on Wednesday from home to Houston.

"Q. Did he go down to the side of the jail?

"A. Yes, sir; he gave me a dollar.

* * * *

"Q. What did he say then?

"A. He gave me the dollar and told me to keep my mouth shut.

"Q. Did anybody else hear that?

"A. Yes, sir.

"Q. Did other people in the jail hear that?

"A. Yes, sir."

On cross-examination, Coleman admitted that, in talking with his own counsel, prior to his declaration aforesaid, he told his own counsel that the shoes which made the tracks aforesaid sat in his room from the time he took them off,

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as he stated, "and hadn't been touched by anybody until about light, when (he) called for them to go out to get some corn for two men who came there in a wagon"; and that, when arrested, on Sunday, March 20, he told the sheriff that the pistol was his, which was introduced in evidence by the Commonwealth as belonging to the accused.

Daniel Harris, in his testimony on the trial of the accused, corroborated the statement of Coleman as to his calling to the accused in the cell of the latter in the Lynchburg jail and asking the accused about wearing the shoes, and that the latter made no reply except to tell Coleman to keep his mouth shut. Daniel Harris, however, was one of those under arrest, charged with the same crime, and it was shown that he lived with Coleman, and he admitted having, at a previous time, denied that he knew anything whatever about the case.

The place at which the deceased, Rickman, was killed, according to the theory of the Commonwealth's attorney, was about thirty-five or forty yards from the public road above mentioned, just in the edge of a body of woods which stood to the west of Coleman's dwelling-house. Between this body of woods and Coleman's house, there was a strip of open field about forty-five yards wide. And the public road, as it goes on westward from the entrance therefrom to Coleman's house (at which point the public road is about seventy-five yards from Coleman's house), curves toward the south, so that the spot at which the deceased was killed according to the theory aforesaid, while within thirty-five or forty yards of the public road, was only about fifty yards from Coleman's house. This spot was somewhat nearer the place where the body was found than Coleman's house, but was practically a mile away from the latter place.

The whole of the evidence on which the Commonwealth has to rely to sustain the theory that the deceased was killed at the spot last mentioned consists of the testimony of two witnesses—a Mr. Wagstaff and Ed Rickman, a brother of the deceased. They made an examination of

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the premises about Coleman's house on Monday afternoon, the second day following the murder. There had been no rain in the meantime. Later on, just when does not appear in evidence, Wagstaff, in company with the Commonwealth's attorney and a Mr. Martin, made another examination of the same locality, with the result stated in the quotations from Wagstaff's testimony as to the latter examination presently to be made.

Wagstaff's testimony just referred to is as follows:

* * * *

"Q. (By the Commonwealth's attorney.) Did you go to that place after the murder and make an examination of the premises?

"A. Yes, sir.

"Q. What day was that?

"A. Monday evening after he was buried.

* * * *

"Q. State what you found. Did you find any evidence of any blood or murder there?

"A. Yes, sir.

"Q. Where was it?

"A. It was right over there; I guess fifty yards from the house, or it may be not that far.

* * * *

"Q. Did you find any tracks?

"A. Yes, sir; there was three or four tracks leading from the back part of Jim Coleman's house coming across the field. * * *

"Q. What kind of tracks were they? Do you think you could identify any of those tracks?

"A. It was a shoe; I suppose No. 5 or 6, or maybe larger than that.

"Q. Was it a small track or a large one?

"A. A small track.

"What size man was Will Rickman?

"A. I reckon he would weigh 130.

"Q. Do you know what size shoe he wore?

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"A. No, sir.

"Q. To the best of your knowledge, from the size of this shoe, would it correspond with his shoe?

"A. Yes, sir.

"Q. That track came from the rear of Jim Coleman's house, across the field to the scene of the murder?

"A. Yes, sir.

"Q. Now, could you tell from the tracks that were made whether the man was walking or running?

"A. He was running; it looked like pretty good speed.

"Q. The tracks were far apart, were they?

"A. Yes, sir.

"Q. What did you find at the scene of the murder?

"A. I saw blood there.

"Q. You saw blood on the ground?

"A. I saw blood on the ground.

"Q. What was the condition of the ground?

"A. It was trampled down.

"Q. Evidence of a scuffle?

"A. Yes, sir.

"Q. Were you, later on, with Mr. Martin and me when we went down to examine the ground?

"A. Yes, sir.

"Q. Were you present when we found this club here? (Referring to the club in evidence to which reference is above made.)

"A. Yes, sir.

"Q. See if that is the club?

"A. Yes, sir; that is the club.

"Q. Where was it found?

"A. I don't suppose it was as far as from here to the corner of that table from where I showed you the man was killed.

"Q. What was the condition of the leaves underneath that club?

"A. It looked like it had been laid down" (on) "a day or so before.

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"Q. The leaves were fresh, were they?

"A. Yes, sir.

"Q. You have testified to that, to the best of your knowledge, you identified Will Rickman's track running from the rear of Jim Coleman's house up to this point. Did you find any other tracks?

"A. Yes, sir; there were three or four tracks along there

"Q. I suppose you could not identify the others?

"A. No, sir; I paid but mighty little attention to them.

"Q. Were they large tracks?

"A. Yes, sir. I called one or two of his brothers when we started across the field.

"Which one of his brothers went there to examine them?

"A. Ed, I think."

* * * *

The testimony of the brother of the deceased above referred to, Ed Rickman, was as follows:

* * * *

"Q. Did you go with Mr. Fred Wagstaff and examine the premises?

"A. Yes, sir.

"Q. Did you see the place on the edge of the woods where the struggle occurred?

"A. Yes, sir.

"Q. What evidence did you see?

"A. I saw his track coming from the house.

"Q. Whose track?

"A. My brother's.

"Q. Did you identify that as your brother's track?

"A. Yes, sir.

"Q. What size shoe did your brother wear?

"A. Five.

"Q. A small foot?

"A. Yes, sir.

"Q. He was a small man, wasn't he?

"A. Yes, sir.

"Q. Where did the tracks come from?

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"A. The west end of the house.

"Q. That is the rear of the house?

"A. Yes, sir.

"Q. And came across the field up to the scene where the struggle appeared to have occurred?

"A. Yes, sir.

"Q. What evidence did you see of a struggle at that place?

"A. I saw a stick there.

"Q. Is that the club there?

"A. Yes, sir.

"Q. What was the condition of the ground there?

"A. The ground looked like it was trampled up right smart.

"Q. Did you see any blood on the ground there?

"A. Yes, sir."

There was no evidence introduced by the Commonwealth which tended to show with any degree of definiteness that the accused was outside of the Coleman house at any time on the night of the murder for as long a period of time as half an hour. The most that such testimony could be said to tend to show is that the accused possibly may have been absent from the house for as long as half an hour during some part of the night between about eleven or 11:15 or 11:30 o'clock and 12:15 or one o'clock; but this can scarcely be said to be proved by such evidence as a fact, with any degree of probability, certainly not beyond a reasonable doubt. The testimony for the accused was to the effect that he was seen here and there about the house during the night from the time the party began until after the murder had been done, at no longer intervals than some ten minutes from time to time.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The only evidence there was before the jury to connect the accused with the crime of which he was convicted, consisted of (a) the testimony for the Commonwealth con-

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cerning the instruments with which it is claimed the murder was committed; (b) the testimony of Jim Coleman; and (c) the testimony of other witnesses locating the place of the killing, according to the theory of the Commonwealth's attorney, in close proximity to where the accused was shown to be on the night of the murder.

(a) With respect to the instruments with which the crime was committed:

The evidence falls far short of identifying the pistol and club in evidence as having been, beyond a reasonable doubt, the instruments with which the deceased was slain. The evidence leaves it equally probable that the crime was committed with some other instruments.

(b) With respect to the testimony of Coleman:

That testimony, if true, was sufficient to support the verdict of the jury. But it was the testimony of one to whom the physical facts of the tracks of the shoes (owned by and found on his feet when he was arrested) pointed, not merely as an accomplice in the crime, but as the murderer. The narrative of the alleged confession of the accused which such testimony presented to the jury is so inherently improbable and well-nigh incredible in itself, and contains, in its repeated references to the dead body being "up the road," such evidence of knowledge on the part of Coleman of the location of the body, which nothing the accused had then said gave him information about (furnishing, indeed, internal evidence, either of the guilt of Coleman of the crime, or of other knowledge about it on his part than that derived, as he claimed, from the accused), as to make such narrative doubly unreliable. Moreover, the circumstances of the repeated previous denials by Coleman of all knowledge on the subject (some of such denials made when being shot at by the mob, under threat of instant death if he did not disclose what he knew) make it almost unbelievable that his narrative aforesaid could be true and

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that he could have refrained from divulging some portion of it before he did. And further, there are the circumstances that, preceding the telling, Coleman took time to frame the story he told; that he was meanwhile having repeatedly impressed upon him, by the detective and others, the predicament he was in unless he could lay the crime upon some one else. These considerations convince us that the jury would not have given credence to the testimony of Coleman had they not been satisfied that he was corroborated by other evidence in the case connecting the accused with the commission of the crime.

There was absolutely no evidence before the jury to corroborate the testimony of Coleman, connecting the deceased with the commission of the crime, except the testimony of Daniel Harris, and the testimony with reference to the location of the place at which the deceased was killed.

As to Daniel Harris' testimony, it merely corroborated Coleman in his testimony, that while in the Lynchburg jail he asked the accused why the latter wore his (Coleman's) shoes, and that the accused made no reply except to tell Coleman to shut his mouth. Harris' previous statement to the contrary, and his intimacy with Coleman, and his being himself one of those who had been arrested and charged with the same crime, were circumstances which indicate that the jury would not have given credence to Coleman's testimony upon the mere corroboration afforded by this testimony of Harris.

(c) We come, then, to the consideration of the testimony with reference to the location of the place at which the deceased was killed.

If the fact was that the deceased was killed at the place within fifty yards of the house of Coleman (the evidence showing that the accused was in and about such house on the night of the murder and about the time the murder was committed), the accused, according to the evidence for the Commonwealth, may have been absent from the house, at

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some time, long enough to have done the killing, and possibly, at another time, long enough to have gone, wearing the shoes of Coleman, and carried the body from such place to the location in the road where the body was found; although the testimony for the Commonwealth failed to show affirmatively that the accused was at any time absent from Coleman's house long enough to have so carried the body. That is to say, in such case the evidence would have shown that the accused may have had the opportunity to commit the crime and take the body to the place at which it was found in the road. Whereas, if the fact was that there was no proof of where the killing took place (the evidence showing that the deceased was not killed at the place at which his body was found), there was an absence of evidence to show that the accused had the opportunity to commit the crime and dispose of the body as aforesaid. In such situation, the fact that the deceased was killed at the place in close proximity to Coleman's house was an essential link in the chain of the circumstantial evidence relied on by the Commonwealth to connect the accused with the commission of the crime.

Accordingly, as appears from one of the bills of exception in the case, the attorney for the Commonwealth, in his closing argument before the jury, made the following statement:

"* * * The facts are that George Dickerson was behind that house selling whiskey. Rickman went back there and bought whiskey from him and accused him of watering it, and they had a row about it. After Rickman left George Dickerson, he went back there and the difficulty was renewed. Of course we do not contend George Dickerson changed his shoes then; he didn't have time, he chased him across that field, killed him, laid him over the fence and then came back to the house and put on Coleman's shoes and then carried the body to where it was found in the road."

To such statement of the attorney for the Commonwealth, the accused, by counsel, objected on the ground that it was

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not supported by the evidence and that there was no evidence in the case on which to base the statement; that it was an appeal to the prejudice and passion of the jury, and moved the court to tell the jury not to consider this statement; but the court overruled the defendant's objection to said argument and declined to instruct the jury to disregard the same. This action of the court is made the basis of one of the assignments of error.

We are of opinion that this assignment of error is well taken.

There was before the jury absolutely no evidence of any probative value, even if it had been a civil case, that any human being was killed at the place referred to in the statement of the Commonwealth's attorney.

There was no evidence whatever of tracks made by the shoes of Coleman, making the nail-prints, or of any other tracks, going from the alleged place of the killing to the place where the body was found in the road. There was no evidence explaining why such vestiges were not apparent on the ground, if they were looked for and were not found. And we find no evidence in the record of the existence of any fence, such as is referred to in the statement of the attorney for the Commonwealth.

There was no evidence that the blood seen at this place was human blood; or that the tracks from the house across the open field made by some person wearing No. 5 shoes were made by the deceased, rather than by some other person wearing that size shoes. No peculiarity whatever about such tracks was shown in evidence.

Preceding the party, doubtless many fowls and likely some animals were killed to provide food which was sold at the party. The whole of the testimony for the Commonwealth on the subject under consideration is entirely consistent with the theory that the tracks of the three or four persons seen across the open ground near the house (not merely of two persons, of the deceased and accused, according to the statement of the Commonwealth's attorney) were the tracks of some persons chasing a fowl or a pig;

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that the blood on the ground was the blood of a fowl, or of an animal, caught and killed there; and that the disturbance of the ground at that place was caused by a no more serious tragedy. And as to the club: There were doubtless many such lying about that and other bodies of woods in the vicinity. There was no evidence that this club had struck across the body of any person or had been handled by human hands, recently before it was found. Indeed, the evidence fails to show beyond a reasonable doubt that the wound in the back of the deceased was made with any club whatever. This wound may have been made, consistently with all of the evidence, by some other instrument, possibly by some automobile running over the dead body in the road. This hypothesis is consistent with the evidence as it appears in the record.

And the circumstances of the public disappointment which would naturally ensue if all of the many persons suspected of and charged with the crime should escape conviction rendered it peculiarly a case in which the jury were liable to be misled into drawing inferences and reaching conclusions touching the guilt of the accused not warranted by a calm and dispassionate consideration of the evidence.

It seems plain, therefore, that the action of the trial court in overruling the objection to the statement of the Commonwealth's attorney and refusing to instruct the jury to disregard such statement, misled the jury into erroneously thinking that there was sufficient evidence before them to sustain the theory of the Commonwealth's attorney that the killing took place in close proximity to the house in which the accused was, as aforesaid; and that the testimony of Coleman was thus corroborated. And we are convinced by the considerations aforesaid that, but for being so misled, the jury would not have convicted the accused upon the other evidence in the case.

Because of such action of the trial court, the case must be reversed and a new trial will be granted to the accused.

Burks, J., concurs in results.

Reversed, and new trial granted.

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DIRECTOR GENERAL OF RAILROADS *v.* HUBBARD'S ADM'R.

(*Richmond, March 16, 1922.*)

1. RAILROADS—Fatal Injury—Negligence—Contributory Negligence —Last Clear Chance—Failure to Warn—Evidence—Demurrer.

Error to Circuit Court of Alleghany county.

Reversed.

J. M. Perry, for the plaintiff in error.

Geo. A. Revercomb and *R. C. Stokes,* for the defendant in error.

BURKS, J.:

This is an action against the Chesapeake and Ohio Railway Company and the Director General of Railroads to recover damages for the death of the plaintiff's intestate, who was killed by a passenger train on the Chesapeake and Ohio Railway on March 31, 1919, while that company was under the control of the Federal government and operated by the Director General of Railroads. After the evidence was all in, the defendants demurred thereto and the trial court overruled the demurrer and entered judgment against both defendants for the sum of $8,000, the amount of the damages assessed by the jury in their verdict. To that judgment, a writ of error was awarded by one of the judges of this court.

The defendant was operating a double-track railroad from Covington to Jerry's Run, a distance of about sixteen miles. Between these two points there are two other block signals, one at R. S. Cabin and another at Moss Run. Between Moss Run and Jerry's Run there is no telegraph station and no means of communicating with trains. Trains may be diverted from one track to the other at R. S. Cabin and Moss Run by "cross-overs" and by switches at Jerry's Run. Just west of Jerry's Run is Lewis tunnel, about seven-eighths of a mile long, and through which the track is single. About half a mile east of Jerry's Run there is a dis-

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used signal station, known as "Old Jerry's Run," on the north side of the railroad, which is occupied by a Mrs. Fridley as a dwelling. From Moss Run to Jerry's Run is upgrade. Just east of Mrs. Fridley's house and Old Jerry's Run tower, the railroad passes through a cut, the bank of which is eighteen feet high on the south side—the fireman's side going west. The western portal of this cut is thirty feet east of Old Jerry's Run tower. Trains going west come around a right-hand curve along the base of the mountain until it reaches the western portal of a cut nearly a quarter of a mile east of Mrs. Fridley's house, from thence the track is straight for 830 feet to a point in the cut just east of Mrs. Fridley's house. It then turns to the left and continues to the left on a three-degree curve to and beyond the point of the accident. Mrs. Fridley's house is thirty-five feet from the eastbound track, and has one window fronting the railroad and another looking west along the railroad track. There is a high bluff on the right or north side of the railroad just west of Mrs. Fridley's house. From a point on the railroad just opposite Mrs. Fridley's front window to the point of set-over hereinafter mentioned is 228 feet five inches, and from the latter point to the point of accident is 311 feet, thus making 539 feet five inches from Mrs. Fridley's window to the point of the accident. From the point of the accident, looking east, to the curve in the cut just east of Mrs. Fridley's is 754 feet six inches.

Lewis Hubbard, the plaintiff's intestate, was a signal maintainer of the Chesapeake and Ohio Railway Company, and at the time of his death had eighteen months' experience as such. For the purpose of discharging his duties, he was provided with a gasoline motor car. On March 31, 1919, in discharge of his duties, he set out with a companion, Saville, on the motor car, to make the trip from Covington to Jerry's Run. He arrived at Moss Run Cabin at 7:50 A. M., and went into the telegraph office and inquired about the running of trains. He was told that a

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westbound freight was approaching and where it was, and that the westbound express train No. 1 was following the freight. He inquired "if there was any show of eastbound No. 1 going by the eastbound track," and the operator told him that he did not know; that he had had no orders to that effect. It was seven miles from there to Jerry's Run. With this information, Hubbard left Moss Run at 8:12 A. M. and put his motor car on the westbound track, and when last seen he and his companion were making good time going west. The freight train (No. 742) passed Moss Run at 8:22 A. M., and proceeded west on the westbound track without stopping. At that time no orders had come to the operator with reference to diverting the express train No. 1 to the eastbound track, but as the freight train passed the operator at Moss Run was instructed to "watch No. 1," which he explained was for the purpose of putting the operator on guard for orders for No. 1. At 8:30 A. M. twenty minutes after Hubbard had left on the westbound track, the operator at Moss Run received orders to divert No. 1 to the eastbound track, and at 8:43, thirty minutes after Hubbard had left, No. 1 arrived at Moss Run, and was diverted from the westbound to the eastbound track in accordance with these orders. After leaving Moss Run, Hubbard and his companion had trouble with the motor on their car, and were pushing it along the westbound track when they passed Mrs. Fridley's house at Old Jerry's Run cabin. After they had passed her house about 200 feet, Mrs. Fridley heard the whistle of No. 1 some distance east of her house, but the windows and doors were shut and it was a quite blustery morning, and she could give no idea as to how far the engine was at that time east of her house. However that may be, looking through the side window of her house, which was closed, to the westbound track, when she heard the whistle blow, she saw Hubbard and his companion set the motor car over from the westbound track to the eastbound track and proceed to push it along the upgrade on the eastbound track without ever at any time turn-

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ing their heads to look back. While they were thus pushing their car along the eastbound track, Mrs. Fridley was still standing at her window and saw No. 1 when it passed on the eastbound track, and she continued to watch the train and Hubbard and his companion until the engine struck them, killing Hubbard and severely injuring his companion. The point at which Hubbard was struck was 311 feet west of the point of set-over. Mrs. Fridley was examined as a witness for the plaintiff, and testified that she was looking out of the window facing the track when No. 1 passed, and she could see through the windows of the engine, and that there was no one on the engineer's seat or on the fireman's seat when the train passed her house, and that there was a curtain hanging down at the back of the cab between the engine and tender, and that she could see through the gangway, but saw no one there. She also testified that she could see no glow from the fire in the engine when it passed her house, and that if the fire-box had been opened there would have been such glow and she would have seen it. Leffel, a witness examined for the plaintiff, testified that from the point of set-over down to what he calls the whistle-post looking east is a distance of at least a quarter of a mile, although he did not measure it, and that the track is nearly straight for that distance. He also testified, however, that there is a curve in the cut just east of Mrs. Fridley's house, and from there to the point of the accident, a distance of 754 feet six inches, the view of the engineer would be cut off. There was offered in evidence two photographs, one marked Exhibit A, and taken from the point of the accident looking east, and showing the track and the Fridley house. The other marked Exhibit B, taken from a point in front of Mrs. Fridley's house (Old Jerry's Run cabin), looking west, to the point of the accident, and a diagram showing the cut and bluff east of Mrs. Fridley's house, and the bluff west of her house and the immediate surroundings.

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The location of what is spoken of by Leffel in his testimony as the whistle-post is not definitely fixed by the testimony, nor can it be told from the testimony where the engine was at the time of the whistle spoken of by Mrs. Fridley. The engineer testified that it was customary to blow for Old Jerry's Run cabin, and at some times it was done and at others not, after the removal of that station, and that he had no recollection as to whether the whistle was blown for Old Jerry's Run on the morning of the accident or not. Unless the engineer or fireman could have seen the point of set-over, or the deceased after the set-over, it is unimportant as to the point at which the whistle was blown except to show the time and place of the set-over and the distance traveled after the set-over and before the accident. The engineer estimated that he was traveling at the rate of from fifteen to seventeen miles an hour, and as Hubbard and his companion traveled 311 feet after the set-over before the accident, it would seem that they were walking at the rate of about three miles an hour. If the engine was traveling at the rate of fifteen miles an hour and Hubbard was walking at the rate of three miles an hour after the set-over, it would place the engine about a quarter of a mile off when the whistle was blown.

A motion was made in the trial court to dismiss the action against the Chesapeake and Ohio Railway Company on the ground that, if there was any liability, the Director General was solely liable, but the motion was overruled and exception taken. This is assigned as error. This ruling of the trial court was erroneous, and its action in this respect will be reversed, and judgment will be entered in this court dismissing the action as to the Chesapeake and Ohio Railway Company with costs. *Missouri Pac. R. Co.* v. *Ault,* 41 Sup. Ct. 593, 255 U. S. —; *N. & W. Ry. Co.* v. *Arrington.* 131 Va.—, 24 Va. App. 571.

One of the grounds of negligence alleged in the declaration was the failure of the defendants to notify the plaintiff's intestate of the transfer of the train which killed him from the westbound track, where such train would usually

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go in the ordinary course of traffic, to the eastbound track. The transfer was made while the decedent was between telegraph stations and could not be notified, but there was no necessity to notify him, as he was in a place of safety and had only to remain there to avoid danger from the train which was transferred. He was going west on the westbound track and the train was transferred to the eastbound track, and the transfer was really in his interest. So also, there was no necessity to notify the crew of the train that the decedent had gone ahead on the westbound track. They were on different tracks and could not collide as long as they remained there. Moreover, while it was the custom to run trains going west over the westbound track, and trains going east over the eastbound track, the railroad company had the right to use its tracks interchangeably for trains going in either direction (*Imler* v. *Union P. R. Co.*, 89 Wash. 527, 154 Pac. 1086), and it was its constant habit to so use them whenever circumstances made it desirable to do so. The engineer who ran the train in the instant case testified that such changes were made over the identical piece of track as often as three days out of seven in the week. The rules of the company gave full warning of this fact, and the evidence is abundant to show that the decedent had full and ample notice and actual knowledge of these facts. No negligence on the part of the company was shown in this respect.

Another ground of negligence charged in the declaration was that the servants of the defendant operating the train which killed the plaintiff's intestate "did see and discover the plaintiff's decedent upon the track ahead of said train a sufficient distance to have stopped said train before it struck him," and a sufficient distance to have warned him of its approach, but failed and neglected to do so. There was no evidence to support this allegation, and it need not be further noticed.

The only remaining ground of negligence alleged was the failure of the servants operating the train to discover the

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plaintiff's decedent on the track and warn him of the approach of the train. These servants were the engineer and fireman of the train which struck Hubbard. We will inquire, therefore, could the engineer have seen the place of set-over, or beyond that point? The track makes a curve in the old Jerry's Run cut, and after reaching this, the curve is against the engineer and he could not see the track six feet beyond his engine. This is fully and clearly established by the testimony of several witnesses. Before reaching this curve there is a piece of straight track 830 feet long. From the engineer's seat on the seat box to the front end of the engine is forty-five feet. This seat is on the right of the engine and there rises above him on the left the boiler and smoke-box, thus obstructing his view to the left so that his lookout is practically straight in front of him. The point of set-over is 443 or 460 feet (measurements differ) from the west end of the straight track and this curve is to the left and against the engineer and continues against him to the point of the accident. In addition to this, even if the engineer, while traversing the straight track, could have seen to the left, his view was obstructed by the bluff eighteen feet high in the cut just east of Mrs. Fridley's house. But he does not claim that his view was obstructed because he couldn't see it from his side of the engine. He says: "I don't say it obstructed my view, because I could not see that bluff from my side of the engine, but what I meant to say, if a man had been looking out of the left side, he would not see anything on that track *until he got by the bluff*." (Italics supplied.) And the division engineer of the company testified that the straight track "is blocked off from the scene of the accident by a big bluff eighteen feet high. The same bluff blocked off the view of the point of set-over. The engineer further testified as to the extent of his view while along the little piece of straight track before you get to the end of the cut, that looking ahead from his position "you could see the old Jerry's Run and then you see into another bluff which is 100 feet high, I reckon." If we look

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to the blue-print used on the reargument, not for the purpose of adding to the evidence, but to visualize the testimony of the witnesses, we find that a straight-edge placed along the piece of straight track and extended beyond the curve in the cut strikes the bluff west of Mrs. Fridley's house on the north side of the westbound track, and leaves the place of set-over and the track up to the place of the accident out of the line of vision of the engineer, thus by the physical facts confirming the testimony of the engineer. The photograph (Exhibit A) and drawing (Exhibit 2) seem also to demonstrate the fact that the point of set-over was not in the line of vision of the engineer. The engineer testified also that he was on his seat and constantly on the lookout from the time he came in sight of Old Jerry's Run until the deceased was struck, and did not see him. The testimony of Mrs. Fridley to the contrary, if credible, can make no difference, for the curve was against the engineer when the engine passed her house and continued so until the deceased was killed, and no amount of diligence or outlook on the part of the engineer could have discovered his presence on the track.

We conclude, therefore, that there was no negligence on the part of the engineer in failing to discover the deceased at the point of set-over or thereafter.

Could the fireman have seen the point of set-over or beyond that point?

It is the duty of a fireman, primarily, to fire his engine, and his employer cannot be charged with negligence for his failure to keep an outlook at a time when his duties require him to be firing. *Brammer* v. *Norfolk & W. R. Co.*, 104 Va. 50; *O'Brien* v. *Wis. C. R. Co.* (Wis.), 96 N. W. 424. His train was running upgrade and he was approaching a long tunnel in which it was desirable to minimize the smoke and gas from the coal, and at the time of the accident he had his engine "just as hot as I could get it." It is important, however, to ascertain when or where he began firing. From the west portal of the cut just east of

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Mrs. Fridley's to the point of the accident the curve was in his favor, and if he had been on his seat box the deceased would have been in plain view and he could have warned him of his danger. His testimony as to the places and distances is not very accurate, and must be read as a whole and taken in connection with the testimony of other witnesses to ascertain the facts. It is true that, in answer to the question where he began firing, the witness stated that it "must have been just west of the tower, not very far west of the tower—that is, Old Jerry's Run tower," but in answer to the question immediately preceding the present answer he had confused the points of the compass and said west when he meant east, and it seems manifest from other answers given by him, as well as the testimony of other witnesses, that he began the firing east of the tower and not west, as he stated. In answer to other questions he stated that as he went into Old Jerry's Run he "was putting in fire"; that before he got to Jerry's Run he had "dropped off his seat" and was "down at the time"; that he had not come in sight of the deceased when he dropped off his seat box to put in the fire; that he was looking out that day before he got down to put in coal, but was not looking out when he came into Old Jerry's Run. In addition to this, Mrs. Fridley, the plaintiff's own witness, testified that he was not on his seat in the engine when the train passed her house, which was very close to the west portal of the cut, and the engineer that at the time of leaving the straight track and taking the curve in the cut, he was putting coal in the engine. We are satisfied that when the engine emerged from the west portal of the cut and passed Mrs. Fridley's house, the fireman was engaged, and properly, in firing his engine. We do not attach great importance to the fact that Mrs. Fridley did not see any glow from the fixebox at that time of the day, and under the exciting circumstances detailed by her; for it may be, as suggested by counsel for the defendant in error, that he had not yet opened the door of the engine and was simply preparing to

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fire his engine. If he was down in the gangway between the engine and tender making the necessary preparations to fire, he was as much engaged about his business and as free from negligence as if he had the door open and was actually shoveling coal into the engine. We do not think that the evidence sustains the suggestion that the fireman could have seen the place of set-over or beyond that point while traversing the straight track before entering the cut just east of Mrs. Fridley's house. Exhibit A and Exhibit No. 2, hereinbefore referred to, seem to negative the possibility of his seeing it. But photographs and drawings do not always give us as accurate ideas of what may be seen from the *locus in quo* as the testimony of unimpeached witnesses who have been on the ground and have observed the situation, and testify as to what can and what cannot be seen from a given point. Such photographs and drawings, however, when consistent with the testimony of witnesses, are strongly corroborative of their testimony. In this case, it appears that on the south side of the railroad in the cut just east of Mrs. Fridley's house there is a bluff eighteen feet high, and that it blocks off the view from the straight track. This bluff is on the fireman's side of the engine going west. Division Engineer Beall was examined as to the siraight track, and testified, amongst other things, as follows: "Q. And that straight track you just spoke of is blocked off from the scene of the accident by a big bluff eighteen feet high, isn't it? A. Yes, sir." And the engineer testified that while on the straight piece of track in the cut, "if a man had been looking out of the left side he would not see anything on the track until he got by the bluff." This is all the testimony there is on the subject, and it is supported by the exhibits referred to. It is admitted that this bluff falls away rapidly to the south, but it does not appear that it ceases to obstruct the view from the straight track. It is also claimed by the defendant in error that the testimony of his witness, Leffel, is to the contrary, because he states that a person standing on the westbound track at

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the point of set-over could see an engine come into view for a distance of about a quarter of a mile, and from that counsel argue: "And, *vice versa*, a person on an engine going west on the eastbound track could see the point on the rails of the westbound track where decedent was, and at which he set over his motor car, for a distance of about a quarter of a mile." This is plainly a *non sequitur*. If he had said he could see the engineer or the fireman, his conclusion might have followed, but not "an engine come into view." The evidence of what could have been seen from the engine by the fireman is not sufficient to establish negligence on the part of the fireman in failing to see the set-over and the deceased thereafter. On the contrary, it negatives the idea. The burden was on the plaintiff to establish that fact.

Upon the whole case, we are of opinion that the trial court erred in overruling the defendant's demurrer to the evidence, and hence its judgment must be set aside, and this court will enter judgment sustaining said demurrer to the evidence and dismissing the case at the plaintiff's costs.

SIMS, J., dissenting:

I find myself unable to concur in that portion of the majority opinion which holds that the evidence of what could have been seen by the fireman is not sufficient to establish negligence on part of the fireman in failing to see the set-over and the deceased thereafter as he was pushing the motor car and moving along the eastbound track in front of the approaching train in obvious unconsciousness of his peril.

The evidence on this subject is conflicting, but the defendant demurred thereto, and, as I view the case, there was evidence for the plaintiff in direct conflict with the testimony for the defendant, which is referred to in the majority opinion, on the subject of what the fireman could or could not have seen of the set-over and the subsequent perilous position of the deceased when and after the whistle

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was blown, and before the fireman got down off his seat to fire his engine; so that under the well-settled rule pertaining thereto, such evidence for the defendant should be disregarded by us.

This is true of the testimony of the fireman which is in conflict with the testimony of Mrs. Fridley on the subject of when the fireman got down from his seat. But, aside from that, the following conclusions, it seems to me, should be reached, on considering the evidence upon the demurrer thereto.

In the first place, it should be noted that, if the engine which killed the deceased was traveling at the rate of fifteen miles an hour and the deceased at the rate of three miles an hour after the set-over, as stated in the majority opinion, the engine was traveling just five times as fast as was the deceased. So that while the deceased was traveling the 311 feet from the place of set-over to the place at which he was killed, the engine traveled only 1,555 feet—a little over a quarter of a mile. This would place the engine a little less than a quarter of a mile off from the deceased when the whistle was blown.

It would follow from this that the whistle was blown just about the time the engine came upon the east end of the piece of straight track referred to in the majority opinion, which was a point 830 feet plus 754 feet six inches (equal to 1,584 feet six inches) from the place where the deceased was killed. Now, bearing in mind that, according to the direct testimony for the plaintiff the set-over occurred immediately following the blast of the whistle, it is plain that the crucial question, as affecting the inquiry concerning the negligence of the fireman in the matter of the lookout kept by him, is what could he have seen of the scene of the set-over and subsequent perilous position of the deceased, which was present in front of the onrushing engine as it passed from about the east end of the straight piece of track, for a distance of about 830 feet plus 100 feet about, making about 930 feet, to a point somewhat east, but near, the

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western portal of the cut, where the fireman got down from his seat to fire his engine, according to his own testimony? (Just here it should be noted that the west end of the 830 feet of straight track is at a point in the cut 100 feet east of the west portal of the cut, and, according to the fireman's own testimony, after correcting his first error in confusing "west" with "east," referred to in the majority opinion, he did not get down from his seat to fire his engine until the engine had about reached the west portal of the cut.) The evidence makes it clear that it was during this time that the set-over occurred and the deceased traveled somewhat over half the distance of 311 feet from the place of set-over to the place where he was overtaken and killed; and that, if the piece of straight track aforesaid was not so much out of line with the place of set-over on the section of railroad track immediately west of that point as to cause the front of the engine to obstruct his view of the scene at the set-over and the conduct of the deceased immediately following, the engineer could and should have seen this scene; and, further, that if, because of the reason mentioned, the front of the engine did cut off the view of the engineer of such scene, the drama was in plain view of the fireman from his seat, unless the bluff which formed the wall of the south side of the cut obstructed the fireman's view.

Now, as the evidence which was introduced before the jury appears in the record, without the aid in its interpretation which is supplied by the blue-print used in the reargument, it seems plain that, on demurrer to the evidence, the inference which must be drawn from Leffel's testimony is that either the engineer or the fireman, more probably the engineer, had an unobstructed view of and would have seen the scene aforesaid and the consequent perilous position of the deceased before the engine reached the west end of the piece of straight track had they discharged the duty of lookout resting upon them. That if this was true of the engineman, the front of the engine did not at any time obstruct that view of the engineman while the engine

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was on the straight track. That if this was true of the fireman, the bluff which formed the wall on the south side of the cut did not obstruct the view of the fireman at any time while the engine was on the straight track, or while it was passing over most of the farther distance of 100 feet from the west end of the straight track to the west portal of the cut.

As bearing upon the conclusion just mentioned, the following should be borne in mind: The testimony of the division engineer referred to in the majority opinion, in regard to "the scene" being "blocked off" by the "big bluff eighteen feet high"—which is the bluff aforesaid which forms the south wall of the cut above mentioned—this testimony has reference to "the scene of the accident," the view from the engine of the place where the deceased was struck and killed, which was 311 feet west of the scene of the set-over. This testimony did not even contradict the testimony for the plaintiff tending to show that from the point where the engine was immediately following the blast of the whistle, namely, about the east end of the straight track, until the engine had reached the west end of the straight track, which was before the fireman got down from his seat to fire the engine, either the engineer or the fireman, if they were in their then place of duty and on the lookout ahead, had the scene aforesaid of the set-over and the moving of the deceased along the eastbound track for a distance therefrom of some 150 feet or more, in obvious unconsciousness of his peril, in plain and unobstructed view. It is immaterial if the engineer or fireman did not, in addition to the set-over, see the deceased traverse the whole 311 feet until he was struck. It is enough to impose the liability in question on the defendant, if the engineer or fireman saw the set-over and the deceased going on in the attitude he presented for 150 feet and more from the place of set-over, until he passed out of sight of the engineer or fireman.

Further:

According to the engineer's testimony, when the engine was on the eastbound track at the west end of the straight

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track, he could see the westbound track six feet west of Mrs. Fridley's house. Another engineer, a witness also for the defendant, testified that going west on the eastbound track, on the straight stretch of track, he could see along the railroad west of Mrs. Fridley's house "about half way between the house and the point of the canon," the point of the canon being the place of set-over, which is about 108 feet west of the west end of Mrs. Fridley's house, instead of six feet, as testified to by the first-named engineer, and about 108 feet from the place of set-over. The defendant's own testimony, therefore, showed to the jury that the testimony of the engineer in charge of the engine in question at the time the deceased was killed, with respect to how far along the tracks he could have seen while the engine was on the straight track, was unreliable.

Further: The line of vision of the engineer from his seat in the engine in question was not absolutely straight ahead. The front of the engine, extending only forty-five feet ahead of the engineer's cab, was not an obstruction which presented a perpendicular side along which the engineer had to look, but a side cylindical in form, and several feet below the eyes of the engineer, curving to the south up to the smokestack, so that the line of vision of the engineer was from his cab window obliquely to his left, along by the north side of the smokestack, at a considerable angle to the southwest of the direct line in which the engine was pointed as it traversed the straight track. Indeed, it is a matter of common knowledge that an engineer can see the whole track directly in front of his engine at no great distance ahead when traversing a straight track. And it is also a matter of common knowledge that the farther and farther ahead, when moving along a straight track, the engineer projects his line of vision, the wider is the radius of that line of vision; such radius gradually crossing the track, then passing to the side of it on the left of the engineer, so that when he looks—say, a quarter of a mile

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ahead—his line of vision to his left side will extend a great many feet to the left of the line toward which the engine is directly pointed.

The testimony for the defendant with respect to how far the engineer could see ahead ignores the physical facts just referred to—it does not distinguish between how far ahead the engineer on the engine which struck the deceased could have seen along the tracks from his seat on the engine when it was near the east end of the straight track, as compared with when it was at the west end of the straight track. And the engineer whose testimony as to how far he could see ahead is referred to in the majority opinion, expressly testifies only to how far he could see ahead along the tracks from the engine as it started "to leave the straight track," or "as it leaves the straight track," *i. e.*, from a point which is at the west end of the straight track. The locality from which the drama aforesaid was to have been seen by the engineer, if seen at all by him, was east of such place, namely, before the engine reached that place, and while it was passing from the east end of the straight track to the west end of it, the distance of about 830 feet, immediately after the whistle was blown. The jury had the right to bear this fact in mind and to conclude that the testimony of the engineer last mentioned was in truth not in conflict with the testimony of Leffel, which tended to show that, from the place where the engine was when the drama aforesaid was acted, the engineer would have seen it if he had looked ahead.

Or, to say the least of the evidence in favor of the plaintiff, on demurrer, it appears, when the position of the engine at the crucial point of time and place aforesaid is visualized in the mind, that the position of the engine was such that if the line of vision of the engineer was too far to his right for him to have seen the drama aforesaid acted before him, that line of vision came so near to the scene of action of the deceased that it is manifest that the fireman at that same time, sitting in the engine cab on the

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other side of the engine, had a line of vision, which would have passed through the cut above the right of way of the railroad and embraced so much of the scene as is material, unobstructed by the bluff which formed the south wall of the cut. And this was the situation when the engine was ample distance away from the deceased for it to have been stopped by the exercise of reasonable diligence on the part of the defendant, before it ran around the curve upon the deceased, and when the fireman, according to his own testimony, was not occupied by his duty of firing the engine and had not yet gotten down from his place.

When we come to consider the blue-print used on the reargument, that does show that while the line of vision of the engineer, when the engine was at the crucial point of time and place aforesaid, put the initial movement of the set-over in plain view of the engineer. However, as the engine moved westward, the engine front probably cut off the view of the engineer of the set-over on the eastbound track and the movement thence of the deceased from that point onward. But a straight-edge, placed from such crucial point on the straight track to the point of set-over, and having its westward end moved to a point, say of about half-way from the point of set-over to the place where the deceased was struck and killed (covering a space along the track of, say 150 feet, including and beyond the place of set-over), demonstrates that the fireman, from the time the whistle was blown until he got down from his seat as the engine was near the western portal of the cut, had the scene aforesaid, or so much thereof as is material, in his plain view, unobstructed by the bluff aforesaid which formed the south wall of the cut.

The material part of the blue-print aforesaid, on a reduced scale, and with some additional lines and notations thereon, is here copied:

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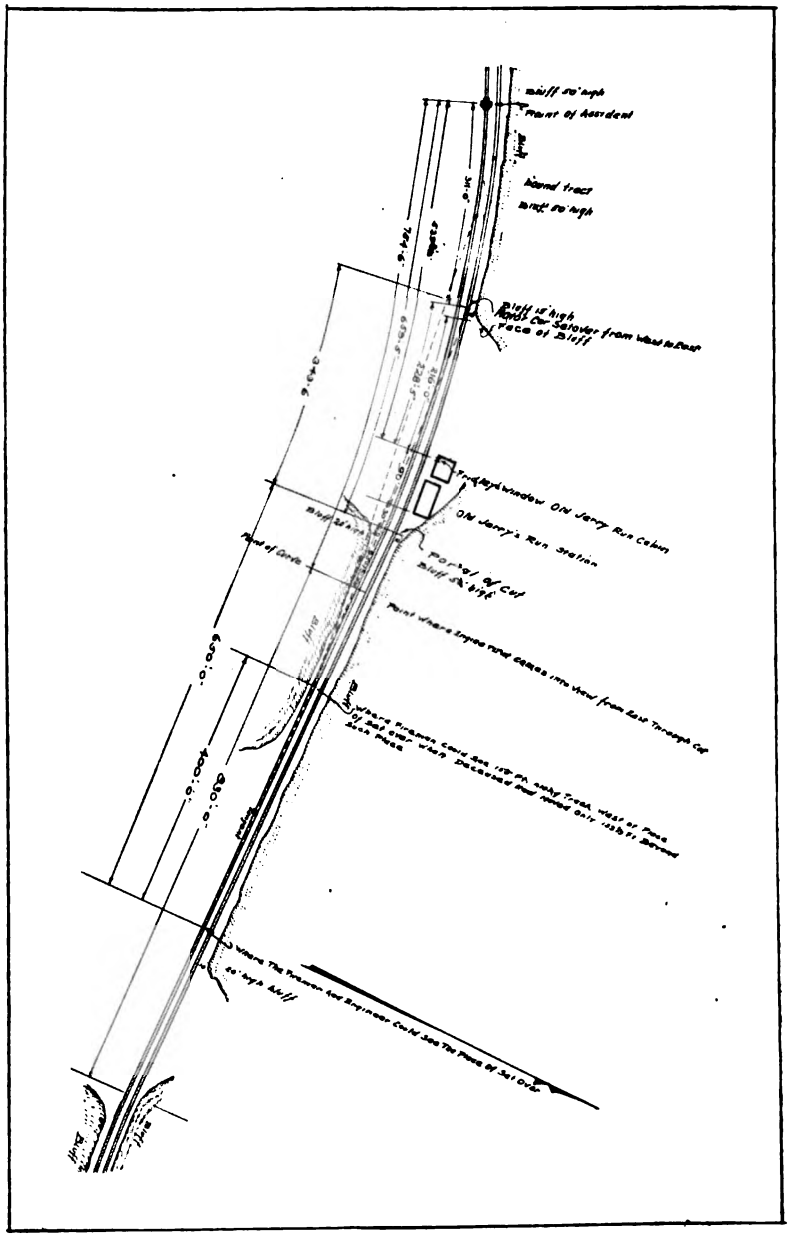
Point of Accident
Bluff 20' high
Bluff 20' high
Face of Bluff
Old Jerry's Run Station
Point of Cut
Bluff 25' high
Point of Cut
Bluff 25' high
Point of Cut
Bluff 25' high
Point where Engineer came into view from East Through Cut
Where Fireman could see 1000 ft. only 7 rods west of Point of Cut Bluff
Where The Fireman and Engineer Could See The Place of Collision
20' high Bluff
Bluff
Bluff

As appears from the blue-print, following the blast of the whistle, the line of vision of the fireman, where it was nearest to the tangent to the curve of the railroad, would have passed over the ditch on the south side of the railroad, in covering the scene of the set-over. And, as that action of the deceased must have occupied an appreciable length of time, the engine, during that occurrence, moving westward at the rate of approximately fifteen miles an hour, must have been moving so far along the straight track, when the deceased moved off after the set-over, that that movement, for a distance of certainly 150 feet, more probably for over 200 feet, must have been within the line of vision of the fireman before he got down from his seat, according to his own testimony, which line of vision would have passed, where it was nearest to the tangent of the curve of the railroad, along the inclined side of the bluff which formed the south wall of the cut, not higher up than half way of its eighteen feet of height, and hence would have been unobstructed by such bluff. This clearly appears from the dotted lines I have drawn and the notations I have made on the said blue-print.

Reversed.

DRAPER v. COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. CRIMINAL LAW—Indictment—Presence of Attorney for Commonwealth in Grand Jury Room—Code 1904, sec. 3988; Code 1919, sec. 4896.
2. IDEM—Evidence—Cross-Examination—Remark of Attorney for the Commonwealth—Attempt to Procure Witness.
3. IDEM—Instructions—Evidence of Accomplice.
4. IDEM—Instructions—Alibi—Burden of Proof.
5. IDEM—Argument of Attorney for Commonwealth Before Jury.

Error to Circuit Court of Halifax county.

Affirmed.

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Martin & Leigh, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General Leon M. Bazile, for the Commonwealth.

General J. D. Hank, Jr., and *Second Assistant Attorney*

KELLY, P.:

The defendant, John H. Draper, indicted, along with fourteen other alleged confederates, for conspiring and attempting to murder one Jim Coleman, was found guilty of an assault, and sentenced to serve a term of twelve months in jail and to pay a fine of $500.00.

The following brief preliminary statement of facts will be helpful to a proper understanding and disposition of the several questions arising on this writ of error:

On Sunday, March 20, 1920, Jim Coleman, a negro, was lodged in jail, charged with the murder of a white man named Rickman. That night an armed mob attacked the jail, and, having unsuccessfully attempted first to secure the keys from the jailer and then to break down the doors, fired a number of shots into the building. The evidence tended to show that the mob was seeking Jim Coleman, and that the defendant was a participant and fired a shot into the room where Coleman was confined. Some of the men in the party were drinking, and the defendant admits that he had taken three drinks in his room at the hotel that night. There was a good deal of shooting, and the community was excited and alarmed. The mob failed, however, in its apparent purpose, and nobody was hurt, but the doors and windows of the jail were damaged, and two or three distillery "worms" which had been captured and stored at the jail were missing after the crowd dispersed.

The defendant denied that he was present or in any way involved in the attack on the jail, but his counsel concedes that there was evidence before the jury sufficient to warrant the verdict. He insists, however, that sundry errors were committed by the trial court to his prejudice, for which we are asked to award him a new trial.

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1. The defendant tendered a plea in abatement whereby he sought to have the indictment quashed on grounds stated in the plea, as follows: "Jas. S. Easley, the attorney for the Commonwealth, after the grand jury was sworn and had retired to their room to consider and deliberate on said verdict, went before said grand jury during their deliberation and advised said grand jury to find said indictment a true bill, and said attorney for the Commonwealth was not at the time he was before said grand jury and while they were deliberating on said indictment, acting as a duly sworn witness. And by reason of said illegal conduct of said attorney for the Commonwealth, and of the said grand jury, this defendant has been injured and prejudiced and said indictment returned."

Issue was joined on this plea, and Mr. Easley, attorney for the Commonwealth, being called as a witness, testified as follows:

"I will state, from my recollection, that I was not sworn as a witness before the grand jury nor did I testify before the grand jury, but I was asked to appear before them, which I did. Those are the facts as I recollect them.

"Did you advise them to find an indictment?

"I did not; no, sir. I was not asked in regard to that. I asked them to strike off two names from the indictment; they asked me if they had a right to find a true bill as to some and not as to others, and I told them they had a right to strike out those names, and they did take a pencil and strike out those two names. As I recollect, that is the question I was consulted about.

"I want to ask you, Mr. Easley, because you will recollect that I mentioned the matter to you several days ago, and my recollection is that you told me that you went before the grand jury, and not being willing to take the responsibility, you advised them to bring in an indictment.

"No, sir; I stated this: that I had stated to the grand jury when they were asking about the striking out of some names in the indictment, I stated that I had included in the

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indictment all the names of everybody about whom information had come to my office connected with this transaction, and it was probable that there was some names included in there that, when tried before a petty jury, they could not be convicted, but I felt it my duty to include in the indictment any names against whom I had information.

"I appeared there, but I did not hurt anybody; I struck off two names. I was inaccurate in saying it was done at my suggestion; I told them they had a right to do it. I want the record to be accurate about that."

This being the only evidence introduced for or against the plea, the court rejected the same and refused to quash the indictment.

Section 4896 of the Code contains the following provision material to the question under consideration:

"It shall, however, be unlawful for any attorney for the Commonwealth to go before any grand jury during their deliberations except when duly sworn to testify as a witness, but he may advise the foreman of the grand jury or any member or members thereof in relation to the discharge of their duties."

This statute (found in section 3988 of the Code of 1904) was construed by this court in *Mullins* v. *Commonwealth*, 115 Va. 945, 950. In that case, the attorney for the Commonwealth was in the grand jury room several times during the deliberations of that body at the term at which the indictment then in question was found, having been called there by the grand jury, not as a witness, but for consultation. He did not advise the finding of the Mullins indictment, and was not present when it was under consideration. This court, in an opinion by Judge Cardwell sustaining the action of the trial court in overruling the defendant's plea and refusing to quash the indictment, said:

"Section 3988 of the Code of 1904 does declare it unlawful for any attorney for the Commonwealth to go before any grand jury during their deliberations, except when duly

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sworn to testify as a witness, with the qualification that 'he may advise the foreman of the grand jury or any members thereof in relation to the discharge of their duties.' It is unquestionably the policy of the statute, as has been the practice in this jurisdiction, to keep the grand jury independent of all outside interference, free and untrammeled in their deliberations, and while it is highly reprehensible for any attorney for the Commonwealth to violate in any degree either the terms or the policy of the statute, it would be a strained construction of it, upon the facts in this case, to say there has been such a disregard thereof as was or might have been injurious and prejudicial to the accused and calling for a dismissal of the indictment against him, upon the ground that it was returned by the grand jury because the attorney for the Commonwealth went before the grand jury while they were in session at the July term of the court, 1912, at which term this indictment was found and returned into court."

We have no disposition to overrule or modify the construction of the statute as expressed in the above quotation from the *Mullins Case,* and while it would have been more prudent and appropriate for the attorney for the Commonwealth in the instant case to have kept out of the room entirely during the deliberations of the grand jury, we think that the case cited furnishes authoritative support for the action of the trial court in rejecting the plea and refusing to quash the indictment. The mere presence of the attorney for the Commonwealth in the grand jury room does not invalidate an indictment found at the time, if, as in this case and in the *Mullins Case,* it satisfactorily appears that the accused was not prejudiced thereby. The admonition by Judge Cardwell, quoted above, should be carefully observed by the attorneys for the Commonwealth, and any "going before the grand jury" to advocate or influence the finding of an indictment would be a clear and substantial violation of the law. But the statute authorizes the attorney to "advise the foreman of the grand jury or any mem-

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ber or members thereof in relation to the discharge of their duty." This advice ought always, as a matter of prudence and propriety, to be sought and given outside of the grand jury room. But we are not prepared to hold that the language of the statute as a whole, construed in the light of its evident purpose and of the decision in the *Mullins Case*, means that when the attorney in response to a request by the grand jury goes to their room and gives them advice "in relation to the discharge of their duty," doing so in a proper manner and without seeking to influence their finding, he thereby renders invalid an indictment thereafter found by them in the case about which he thus gives the advice. The revisors and the legislature incorporated section 3988 of the Code of 1904 without change in the Code of 1919 (sec. 4896), thus impliedly adopting the construction placed thereon by the *Mullins Case*.

In the case at bar, Mr. Easley went before the grand jury, not voluntarily, but at their request, not to advise whether they should find an indictment, but to say whether they had a right to find a true bill as to some and not as to others whose names appeared in the draft of an indictment which had already been prepared by him. There were evidently two names included in that draft which they were disposed to omit, and upon a fair interpretation of his testimony it seems clear that all he did was to tell them that they could if they thought proper strike out those two names. It is true that he said in the course of his testimony that he "asked them to strike off two names," and that he "struck off two names," but the general trend of his testimony, as above outlined, indicates that what he actually did was merely to tell the jury, in answer to their inquiry, that they had the right to strike the two names out; and he removed any doubt about what occurred by his concluding statement, which was: "I was inaccurate in saying that it was done at my suggestion. I told them they had a right to do it. I want the record to be accurate about that."

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Under these circumstances, it seems reasonably certain that no actual harm was suffered by the prisoner as the result of Mr. Easley's visit to the jury room. If he had given the same advice to the foreman, or to one or all of the members of the grand jury, outside of the room, he would have been strictly within the requirements of the law, and precisely the same indictment would have been found. It would be contrary to the *Mullins Case,* and likewise contrary to our own best judgment, to hold that the incident constituted vital and reversible error.

The undoubted purpose of the statute was to preserve privacy of deliberation and independence of action by the grand jurors, free from outside control or influence. These considerations have always been regarded in law as essential to a safe and proper discharge of duty by inquisitorial bodies of this character, and the statute can hardly be regarded as anything more than declaratory of the general law. It is said in 10 Enc. Pl. & Pr., page 398: "As heretofore stated, indictments must be found by authorized grand jurors, other persons being excluded from participation, and the action of the grand jury in finding or refusing to find indictments cannot be interfered with or influenced by any person whatsoever. Statutes have been generally enacted for the purpose of preserving the privacy of deliberations of the grand jury. But the rule does not prohibit the presence of authorized officers, at least up to the time of the action of the grand jury in determining the result. Thus the prosecuting attorney is the legal adviser of the grand jury in respect of the manner of its proceeding, and may be present and assist it by his counsel. But he can act only as adviser, and has no right to exercise any manner of control over its actions."

The authorities generally, independent of statute, are to the above effect. We do not wish in the least degree to weaken or impair the sound policy of the law which seeks to secure free and independent action on the part of the grand jury; but the conduct of the attorney for the Com-

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monwealth, as approved by the trial court in this case, can hardly be regarded as a substantial violation of such policy, and it certainly did not result in a substantial violation of the rights of the accused.

2 }

2. The sheriff of the county was permitted to testify that he had attempted to summon Clark Draper, a brother of the prisoner, as a witness for the Commonwealth, and had not been able to find him. The prisoner's father, I. J. Draper, was cross-examined as to the whereabouts of Clark Draper. The prisoner was likewise cross-examined on this point, and was also asked whether he knew that his brother, Clark, was going to be summoned as a witness for the Commonwealth. During the cross-examination of I. J. Draper, the attorney for the Commonwealth took occasion to say: "We tried to summons him, but he beat us to it."

All of this testimony and examination was allowed over the objection and exception of the prisoner; and it is argued that the clear purpose thereof was to create the impression upon the jury that Clark Draper would have been a material witness against the defendant, and that he was, therefore, responsible for his brother's non-appearance as a witness.

We do not perceive that the prisoner could have been prejudiced by the testimony recited above and what occurred in connection therewith. It is said in the brief for the prisoner that there was no other evidence in the record about Clark Draper, but this is a mistake. A witness for the Commonwealth had testified that he and Clark Draper had been with John Draper and the other members of the mob shortly before the assault on the jail, and had restrained him from shooting at a certain colored man on the way. If this statement was true, then Clark Draper would have been a material witness for the Commonwealth; and if it was not true, he would have been a material witness for the defendant. Under these circumstances, the Commonwealth had the right to show that it had attempted to procure Clark Draper as a witness, and further, to inquire

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of both the prisoner and his father whether they knew the whereabouts of Clark Draper and whether they had anything to do with keeping him away from the trial. The fact that they did not attempt to produce Clark Draper or account for his absence, when there was evidence before the jury tending to show that he knew material facts in the case, was a matter for fair inference and argument.

It is further stated in the brief for the prisoner that the attorney for the Commonwealth argued to the jury that the defendant was responsible for the absence of Clark Draper as a witness. There is nothing in the record to show that such an argument was either made or objected to, and it is familiar law that this court cannot regard any alleged error which is not affirmatively shown by the record. If such an argument was made and was improper, it could only be availed of here after having been excepted to and made a part of the record at the trial.

3 }

3. Two of the witnesses introduced in behalf of the Commonwealth were members of the mob that attacked the jail, and their testimony tended to implicate the prisoner. At the conclusion of all the evidence, the prisoner asked for the following instruction: "The court instructs the jury that, as the evidence of an accomplice is tainted, and the danger of collusion between accomplices, and the temptation to clear themselves by fixing responsibility upon others is so strong, the jury should receive and act upon such evidence with great caution. And the court further instructs the jury that the evidence of one accomplice cannot be deemed to corroborate that of another."

The court refused to give the instruction just quoted, but gave, in lieu thereof, the following:

"The court instructs the jury that, while they may find a verdict upon the unsupported testimony of an accomplice, such evidence is to be received with great caution, and the court, in this case, warns the jury of the danger of basing a verdict on the unsupported testimony of an accomplice."

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Counsel for the prisoner admitted that the instruction given by the court was a proper substitute for the first part of the instruction as asked for by him, but insists that the court erred in refusing to tell the jury that the evidence of one accomplice cannot be deemed as corroborating the evidence of another. It would have been proper to give an instruction in terms covering the proposition expressed in the last sentence of the instruction requested by the defendant. As was said by this court in *Jones* v. *Commonwealth*, 111 Va. 862, according to the generally accepted rule, "if two or more accomplices are produced as witnesses, they are not permitted to corroborate each other, but the same rule is applied and the same confirmation is required as if there were but one"; and it was therein held to be error (though not the principal one upon which the reversal was based) that the trial court refused to instruct the jury accordingly. In that case, however, it does not appear what other instructions were given, and, of course, the point ought to have been covered in some such way as to be entirely fair to the accused. But it is conceded that a conviction may be based upon the testimony of a single accomplice, without any corroboration, and in view of the caution with which the jury was admonished in the instant case to regard such evidence, we are of opinion that there was no error to the prejudice of the prisoner in the instruction given upon this point, or in the refusal to give one in the exact form in which it was asked by the prisoner. The jury was not bound to find corroboration—they could convict without that—but corroboration was present, if needed, in the testimony of witnesses who were not accomplices. This assignment of error is, in our opinion, without merit.

4 }

4. The next assignment calls in question the correctness of the following instruction given by the court at the instance of the Commonwealth and over the objection of the defendant:

"The court instructs the jury that the burden rests upon the Commonwealth to make out its case against the accused

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to the exclusion of a reasonable doubt, but where the accused relies upon or attempts to prove an alibi in his defense, the burden of proving the alibi rests upon him."

The proposition contained in the concluding part of the foregoing instruction gives rise to the question here under consideration. That proposition, standing alone, would indicate that there must be a preponderance of evidence for the alibi, and would constitute reversible error were it not rendered harmless by the context, and by the language of other instructions in the case.

The Commonwealth was trying the accused upon the theory that he was present and actively participating in the unlawful acts of the mob at the jail. There was certainly no burden of any sort on the defendant to show that he was not there until the Commonwealth had made a *prima facie* case against him. The burden was on the Commonwealth to show his presence beyond a reasonable doubt. That fact was an essential part of its case. 12 Cyc. 384, text and cases cited in note 18.

The case of *Lucchesi* v. *Commonwealth,* 122 Va. 872, 883, relied on by the Commonwealth, is not in point. The defense there was distinctly affirmative, and the instruction on burden of proof was not questioned in that particular. The objection made to it was on another ground.

In 2 Am. & Eng. Enc. (2nd Ed.), page 53, it is said: "Alibi is regarded by some courts as an affirmative defense, but the better doctrine seems to be that it is not a defense in the accurate meaning of the term, but a mere fact shown in rebuttal of the State's evidence; and, consequently, the evidence introduced to support it should be left to the jury, uninfluenced by any charge from the court tending to place it upon a different footing from other evidence in the case or calculated to disparage and excite prejudice against it." See also *State* v. *Kelly,* 16 Mo. App. 213; *Albritton* v. *State* 94 Ala. 76; *State* v. *Reed,* 62 Ia. 40; *State* v. *Rockett,* 87 Mo. 666; 1 Bishop Crim. Proc. 1066.

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In *State* v. *McQueen*, 69 N. J. L. 531, 55 Atl. 1006, 1009 (citing *Sherlock* v. *State, infra*), the Supreme Court of New Jersey dealt with the question here under consideration as follows: "Another assignment, however, deals with the refusal of the judge to charge as requested upon the question of *alibi*. He was asked to charge that if, upon the whole case, the testimony raised a reasonable doubt that the defendants were present when the alleged crimes took place, they should be acquitted. Another instruction requested was: 'That the defendant is not bound to prove an *alibi* beyond a reasonable doubt; if, upon the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted.'

"As McQueen admitted his presence, these requests were pertinent only to the case of Grossmann. Both requests were refused, with comments that gave the jury to understand that while a defendant asserting an *alibi* was not bound to prove it beyond a reasonable doubt, he must establish it by a clear preponderance of evidence. The impression left upon the jury must have been that the evidence tending to show the absence of Grossmann was to be disregarded, unless it outweighed that which tended to prove his presence at the scene of the riot. But whatever goes towards proving an *alibi* (although it falls short of establishing it), at the same time tends to throw doubt upon the commission of the crime, where the presence of the defendant is essential to guilt. And if a reasonable doubt of guilt is raised, even by inconclusive evidence of an *alibi*, the defendant is entitled to the benefit of that doubt."

The opinion in the *McQueen Case* shows that the comments of the trial judge in charging the jury in that case upon the subject of *alibi* were such as to lead them to think that the defendant must prove his *alibi* by a preponderance of evidence, and this was held to be error.

In *Sherlock* v. *State*, 60 N. J. L. 31, 37 Atl. 435, the Supreme Court of New Jersey held that it was error to in-

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struct the jury in a criminal case that a defendant relying upon an *alibi* must prove it by a preponderance of evidence, this ruling being based upon the ground that such an instruction may have deprived the defendant of the benefit of a reasonable doubt in the mind of the jury as to whether he was present when proof of his presence was essential to his conviction.

In Beale's Crim. Pl. & Pr., section 289, it is said: "Thus, where the evidence offered by the defendant is of an *alibi* —that is, that he was at another place at the time the crime was committed, and therefore could not have committed it—he is obviously merely disproving the truth of the prosecution's evidence or inference from evidence; he is making an absolutely negative defense. It is not for him to establish an *alibi*, but simply to throw doubt on the case of the prosecution. Clearly, therefore, when he produces evidence tending to prove an *alibi*, no burden is on him; if he raises a reasonable doubt of the charge, he is to be acquitted." See also 4 Wigmore on Evidence, p. 3561, sec. 2512, par. (a), and cases cited in note 3.

We approve the following statement from the text in 2 Am. & Eng. Enc. (2nd Ed.), page 56: "The true doctrine seems to be that where the State has established a *prima facie* case and the defendant relies upon the defense of *alibi*, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused." See also *State* v. *Lowry*, 42 W. Va. 205, 212, 24 S. E. 561; 12 Cyc. 384, text and cases cited in note 18; 8 Ruling Case Law, p. 224, sec. 220, and cases in note 12.

That portion of Commonwealth's instruction No. 1 here complained of would, as we have already indicated, probably have led the jury to think that the *alibi* must be established by a preponderance of evidence, and thus have been

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in conflict with the better doctrine and with the weight of authority, but for the fact that the instruction as a whole, taken with the other instructions, could not have been so construed. The jury must have understood that such burden as rested on the defendant required no more than that he should, by his proof, raise a reasonable doubt as to his presence and participation in the mob. In 2 Am. & Eng. Enc. (2nd Ed.), the text, as we have seen, goes very far in holding that the accused in a criminal case never has to do more with his proof of an *alibi* than to raise a reasonable doubt of his presence at the time and place of the crime, but says, nevertheless, on page 55: "Where, on a question of *alibi*, the charge of the court contains an objectionable statement of law, this is no ground for a reversal if the remainder of the charge, or the charge taken as a whole, contains a full and fair exposition of the law." Citing numerous cases.

The learned judge of the trial court in the instant case evidently acted upon the authority of *Thompson* v. *Commonwealth*, 88 Va. 45, 47, in which it was held that an instruction for the Commonwealth containing the identical language objected to in this case was not erroneous, because the instruction containing that language, and also an instruction given in the case for the defendant, made it clear that the burden was on the Commonwealth to prove beyond a reasonable doubt everything essential to the establishment of the charge in the indictment. Exactly the same thing is true in this case as in the *Thompson Case*. The instruction complained of starts out with the proposition "that the burden rests upon the Commonwealth to make out its case against the accused to the exclusion of a reasonable doubt." Instruction "B," given at the instance of the defendant, told the jury, among other things, that "the burden of proof is upon the Commonwealth to prove beyond a reasonable doubt all the material facts alleged in the indictment or the prisoner must be acquitted"; and instruction "E," given at his request, was as follows:

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"The court instructs the jury that the law presumes every person charged with crime to be innocent until the Commonwealth has established his guilt by evidence so strong, so clear, and so conclusive, that there is left in the minds of the jury no reasonable doubt as to his guilt. This presumption is an abiding presumption, and goes with the accused through the entire case and applies at every stage thereof until repelled by proof.

"And in this connection the jury is instructed that it is never sufficient that the accused, upon speculative theory or conjecture, may be guilty; or that by the preponderance of the testimony his guilt is more probable than his innocence; for until his guilt has been proved beyond all reasonable doubt in the precise and narrow terms as charged in the indictment, the presumption of innocence still applies, and they must acquit him."

We feel entirely safe in deciding that the Commonwealth's instruction No. 1, here complained of, could not have prejudiced the defendant. If the evidence in respect to the *alibi* left any doubt in the minds of the jury as to his presence and participation in the crime, it necessarily left a doubt in their minds as to his guilt, and in that event they were bound to acquit him under the unmistakable directions of the court.

5 }

5. The attorney for the Commonwealth, in closing the argument of the case before the jury, said: "Are we to permit a crowd of moonshiners to come into our town, shoot it up, frighten the women and children, break into our jail and destroy the county's property, and go unpunished?" The use of this language by the attorney for the Commonwealth was objected to by defendant's counsel on the ground that there was no evidence to support it, that it was an appeal to the prejudice and passion of the jury, and that the defendant was not being tried for any of the acts therein mentioned. This objection was overruled, and the defendant excepted.

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Assuming that the term "moonshiners," as used by the attorney for the Commonwealth and as understood by the jury, was meant to describe persons engaged in the illicit manufacture and sale of ardent spirits, there was no evidence in the record to show that the members of the mob belonged to that particular class of law-breakers, unless the fact that they seem to have stolen two or three "worms" from the jail, and were themselves under the influence of whiskey, tended to prove that fact. The proof that they did "shoot up the town," in the common acceptation of that expression; frighten women and children, break into the jail, and destroy, or certainly injure the county's property, was altogether sufficient to justify what the Commonwealth's attorney said in that respect, if he had any right to refer to the general conduct of the mob in connection with the principal charge against this defendant.

It is true that Draper was not being tried for any of the things to which the above-quoted language of the attorney for the Commonwealth referred, and, strictly speaking, the attorney might more appropriately have invoked the necessity of enforcing the law, and thus preserving the peace and good order of the community, by a criticism of what was the ultimate purpose of the mob, but the essence of the appeal which the Commonwealth's attorney made to the jury was right and proper. Men who come by night, intoxicated and armed, to take the law in their own hands, and interfere by force and violence with a due and orderly administration of justice, and with the proper discharge of duty by duly constituted officers, are no less violators of the law than those who by night make and sell whiskey; and, though the accused was not charged with frightening women and children and damaging or destroying the county's property, those things were the necessary consequences of what the mob was deliberately and unlawfully doing, and added to the enormity of their crime. The fact that the pointing out of these aggravating circumstances was likely to arouse the indignation of the jury, does not

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justify the charge that the attorney for the Commonwealth was making an appeal to the passion and prejudice of the jury. Persons charged with a violation of the law have the right to a trial free from the influence of passion and prejudice, but they do not constitute such a favored class as that they may demand immunity from all feeling of disapproval or indignation on the part of those who try them when there is satisfactory evidence that they are guilty.

In both civil and criminal cases, very considerable latitude is, and must be, allowed counsel in the argument of their cases, and we do not perceive that the attorney for the Commonwealth in this case went at all beyond the reasonable limits of a fair argument, nor that the court was in the least degree wrong in refusing to exclude his remarks.

There are other errors assigned in the petition upon which this writ was granted, but they were expressly waived at the oral argument.

For the reasons stated, the judgment complained of is affirmed.

BURKS, J., dissenting:

Section 4896 of the Code, quoted in the opinion of the court, belongs to the class of statutes known as criminal statutes, and should be strictly construed against the Commonwealth. The object of it was to exclude attorneys for the Commonwealth from the grand jury room during the deliberations of the grand jury in all cases, except the single case mentioned in the statute—"when duly sworn to testify as a witness." If he goes there under any other conditions, his act is declared to be unlawful. In this case, he went while the grand jury were deliberating on this indictment. His act was in direct contravention of the statute. This being true, I do not think that any testimony should be received in explanation of what he did or said while there. His advice to the foreman, or any member of the grand jury should be given elsewhere, and the grand jury left untrammeled during its deliberations.

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I also think that the instruction on the subject of *alibi* is contradictory and misleading. The latter part of it is plainly wrong, as pointed out in the opinion. When the instruction is read as a whole, it apparently says that, as a general rule, the Commonwealth must make out its case against the accused to the exclusion of a reasonable doubt, but that the defense of *alibi* is an exception to this rule, and if the accused relies upon it, "the burden of proving the *alibi* rests upon him.

Affirmed.

EVANS *v.* COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. INTOXICATING LIQUORS—Manufacture and Sale—Evidence—Malice.

Error to Circuit Court of Halifax county.

Affirmed.

McKinney & Settle, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

PRENTIS, J.:

The plaintiff in error, who has been convicted under the statute prohibiting the manufacture and sale of ardent spirits, is here assigning one error—that is, that the court erred in overruling the motion to set aside the verdict as contrary to the law and the evidence.

It is unnecessary to recite all of the evidence, because it appears from the evidence introduced on behalf of the Commonwealth that the Federal prohibition agents and the county police had located a distillery in Halifax county; that the accused and another were seen and recognized by two of these officials, who saw the accused filling up fruit

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jars with whiskey which he was dipping out of a tub at the distillery; that they had filled up eleven fruit jars and were about to fill another when, having evidently seen some of the officers, they ran away; that another witness saw them running through the woods from the direction of the distillery; that they took an automobile which had been waiting, and that they were arrested in that automobile a few minutes afterwards by another one of the officers. The defendant introduced evidence tending to contradict all of these incriminating circumstances, but, as the jury heard and saw all of the witnesses and credited the evidence which so clearly indicates the guilt of the accused, their finding is conclusive. The attorney for the accused appears to realize that this result is inevitable, and undertakes to escape it by stating in his petition that the "officers testified falsely against the petitioner * * * and that they were actuated so to do solely through malice." It is sufficient to say as to this that there is nothing in the record to justify this imputation against the witnesses for the Commonwealth.

Affirmed.

EWING v. HAAS, JUDGE.

(*Richmond, March 16, 1922.*)

1. APPEAL AND ERROR—Prohibition—Jurisdiction—Bias of Judge of Lower Court in Case to be Tried—Preparation of Portion of Brief on Appeal—Attorney and Client—Indiscreet, Unwise and Injudicious Conduct.

Upon petition for writ of prohibition.

Refused.

Edward C. Martz, D. O. Dechert, Jno. T. Harris and *Hugh A. White,* for the petitioner.

H. W. Bertram, Geo. S. Harnsberger and *Geo. N. Conrad,* for the respondent.

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PER CURIAM:

This is an application for a writ of prohibition to prohibit the Hon. T. N. Haas, judge of the twenty-fifth judicial circuit, from hearing an action of law pending in his court under the style of *Ewing* v. *Dutrow*.

The facts and circumstances leading up to the controversy are as follows: A suit in chancery had been brought by Ewing and others against the Dutrows to recover damages for deceit alleged to have been practiced in the sale of certain corporate stock. There was a demurrer to the bill and several grounds of demurrer were stated, but the chief ground of demurrer relied on, and the one upon which Judge Haas rested his decision, was that equity was without jurisdiction in the premises and that the complainants' remedy was at law. On this ground, the complainants' bill was dismissed. An appeal was taken to this court, which affirmed the judgment of the trial court. Thereupon, Ewing brought his action at law in said circuit court against the Dutrows. Before the latter case was called for hearing, Ewing applied to Judge Haas, by motion in open court, supported by his affidavit, to certify to the Governor that he was so situated with reference to the case as to render it improper, in his judgment, for him to sit, and to ask for the designation of another judge to sit in the case. This application was promptly denied. Thereupon, the present petition for a writ of prohibition was filed in this court. The petition alleges, as the ground of the writ, "that the Hon. T. N. Haas, judge of this court, who passed upon the demurrer in said chancery suit, and entered said decree dismissing the same, wrote the greater portion of the brief for appellee upon said appeal, and, as affiant believes, by reason thereof, is not now in the unbiased position which, under the law, a judge should occupy in presiding at the trial of this case; and, as affiant believes, said judge is not capable of presiding fairly at such trial." Judge Haas and the Dutrows were made defendants to the petition, and answered the same. Depositions were taken on each side and

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the case is now before us for decision. Judge Haas, in his answer and also in his deposition, details fully his connection with the brief filed for the Dutrows in this court and denies any bias or other reason that would render it improper for him to sit in the case. In his answer, he says:

"At the time of deciding the case in the circuit court, this respondent prepared a written opinion containing his decision and the reasons for it, but this opinion was not present with the papers of the case when the decision was announced in court, having been left lying in a basket on respondent's desk, in his study, at his home, when the papers in this case, along with other cases, were put into his bag and carried to court. The case was decided in January, 1919. Some time afterwards—how long, the respondent does not remember—the opinion which had been prepared, as aforesaid, was handed by respondent to counsel for defendants (appellees) in the case to make such use of as he might see fit on the hearing of the case in the Court of Appeals. The greater portion of this opinion was embodied in the brief of counsel for the appellees (the Dutrows), with matter of his own interspersed in it here and there. The portions of the opinion used (some of it not being pertinent to the matter of a brief) commences on page '5' of the printed brief and ends at the top of page '8,' and would aggregate, if all the parts of the opinion were brought together, about two pages. The opinion aforesaid is all the matter of which respondent was the author, that went into the brief of counsel. The printed brief contains sixteen pages. This respondent knew nothing about the preparation of the brief or what it contained until a day or two before the argument of the case in the Court of Appeals, in September, 1920, when Mr. George N. Conrad, counsel for the appellees, handed him a copy of his brief, already printed and filed, and at the same time, as respondent believes, a copy of the reply brief for appellants, which also had already been printed and filed. As your honors well

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know, it is not an uncommon thing for counsel to furnish copies of their briefs in the Court of Appeals to the judge of the lower court.

"In the opinion prepared by respondent when deciding the case in the circuit court, respondent had referred to the jurisdiction exercised by the court of chancery to decree an abatement of purchase money for a deficiency in the quantity of land sold, and said that was a different case from a demand for damages such as was made by the bill in the *Ewing Case*—proceeding further to distinguish the two cases briefly. Counsel for appellants, in their reply brief (p. 5), commenting upon the chancery jurisdiction to abate or compensate for a deficiency in the quantity of land sold, and seeking to draw from it an argument to support the jurisdiction in chancery of a demand for damages for deceit, said: 'Appellees admit that equity has jurisdiction of a bill for an abatement of purchase money on a sale of land for a deficiency, and say "but that is a different case from the one made by the bill in the case"; they fail, however, to differentiate between them.' And further: 'The equitable jurisdiction being established to decree an abatement of purchase money, even in a case of mistake, not induced by fraud, how much more reason is there for the power, in equity, to restore to the injured party the loss occasioned by an actual fraud.'

"On reading the reply brief for appellants, respondent, who had made a more exhaustive examination of the question at the time of writing the opinion than was expressed in the opinion, told Mr. Conrad that he would give him an answer to the two paragraphs above quoted, and proceeded to elaborate in a pencil note the treatment of the question contained in the opinion, and gave it to Mr. Conrad, counsel for appellees, this note citing and quoting from the case of *Blessing* v. *Beatty*, 1 Rob. 287, 298, a case which respondent is satisfied he examined when the case was before him in the circuit court, though it was not cited in the opinion, probably because the reference was not immediately at hand

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when the opinion was written. What use Mr. Conrad made of this memorandum (which makes about a page and a half of typewritten matter), respondent did not know definitely until the 21st day of September, 1921, when he caused an examination to be made of the files of the case in the records of the clerk's office of the Supreme Court of Appeals, at Staunton, and upon information obtained in that way, as well as from the recollection of Mr. Conrad himself, respondent avers that the note furnished by respondent was never filed in the case at all, but the case of *Blessing* v. *Beatty*, referred to in the note, was cited by Mr. Conrad, with a statement of its purport, in a typewritten 'insert' comprising something less than nine lines, which was inserted in the paging of the brief, as respondent is informed, with the consent of counsel for the appellants.

"In the course of fifteen years of service as judge of the twenty-fifth judicial circuit of Virginia, respondent has on a number of occasions given authorities and suggested arguments to counsel for use on appeal from his decisions, and sometimes has given written memorandums. He has given such authorities and suggestions to counsel for the appealing party, to combat his own decisions with, as well as to counsel who were for affirming his decisions. He does this sometimes from the bench, and sometimes in conversation with the counsel, together or separately, indifferently, as it may happen or as occasion may arise. His object has been to give such material as he had at hand, as the result of his study and research in reaching his own decisions, to the elucidation of the question involved. Respondent's interest is an intellectual and professional interest, not singular or unusual, and even involving little if any pride of opinion, though, of course, he desires to be right, and to be confirmed in his opinion that he is right by the approval of this honorable court.

* * * *

"Respondent denies that he is in a position of bias or prejudice by reason of his action in the premises, or be-

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cause of anything else, and submits that the cause assigned for this proceeding is without merit and an empty thing."

It appears from the testimony that the opinion of Judge Haas was not made a part of the record, nor filed with the papers in the cause in the clerk's office; that Mr. Conrad is a brother-in-law of Judge Haas; that counsel for Ewing had no knowledge or information about the delivery by Judge Haas to Mr. Conrad of the copy of his opinion, or the pencil memorandum in answer to appellants' reply brief, but that they recognized Judge Haas' style in the brief for the Dutrows, and brought it to his attention, when he admitted the giving of said opinion to Mr. Conrad, and in this way they learned for the first time what had been done. A number of lawyers of the Rockingham bar testified that they had never received from Judge Haas assistance such as he sets out in his answer he had "on a number of occasions" given to counsel.

The parties waived all questions as to the jurisdiction of this court to award the writ and have asked us to decide the case on its merits. Any order we could make in the case, except to dismiss it, would be the assumption of jurisdiction, hence we must pass on the question. *Bragg* v. *Justis*, 22 Va. App. 298.

In 23 Am. & Eng. Enc. of Law (2nd ed.) 223, it is said: "A writ of prohibition will lie to restrain a judge from presiding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of cause." The following, among other cases, are cited to sustain the text: *Walton Bloomfield Gravel Min. Co.* v. *Kaiser*, 58 Cal. 315; *Connolly Gold Min. Co.* v. *Kaiser*, 58 Cal. 328; *State* v. *Wear*, 129 Mo. 619; *State* v. *Board of Education*, 19 Wash. 8, 67 Am. St. Rep. 706. But in *People* v. *Jerome*, 26 Misc. (N. Y.) 256, the writ was refused when sought upon the ground that the judge was biased where no interest on the part of the judge was shown. It is also said in 32 Cyc. 607, that where a

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judge is disqualified by reason of interest, prohibition will lie, although the court over which he presides has jurisdiction.

In *Coal Co.* v. *Doolittle,* 54 West Va. 210, the above quotation from the 23 Am. & Eng. Enc. of Law is cited with approval. In the latter case the disqualification was on account of interest in the subject matter and not mere bias, and in paragraph 3 of the syllabus it is said:

"In order to disqualify, the interest of the judge must be in the subject matter of the case, and not merely in a legal question involved in it," but the text of the opinion hardly warrants the opinion.

In the instant case, the Circuit Court of Rockingham has jurisdiction of the case, but the allegation of the petition is that, Judge Haas is disqualified to sit by reason of the fact that he "wrote the greater portion of the brief for the appellee" and "is not capable of presiding fairly at such trial." If Judge Haas is in fact disqualified to sit in the case, but, notwithstanding such disqualification, is about to sit therein, it is a proper case for awarding the writ, although the court over which he presides has jurisdiction thereof.

The peculiar feature of this case is that the objection to the judge is not on account of interest in the subject matter, nor of relationship, by consanguinity or affinity, to any of the parties, but on account of bias on a purely legal question which has been settled and determined, and cannot again arise in the present controversy. Counsel for the petitioner seem to realize this, and have very earnestly argued before us that the position of Judge Haas is that of attorney for the Dutrows in the case and that he has thereby incapacitated himself to sit as judge. In this view, we cannot concur. In order to establish the relation of attorney and client, there must be a contract of employment, express or implied, between the attorney and the party for whom he appears or some one authorized to represent him. 2 R. C. L. 953, sec. 25, 3 Cyc. 926, 3 Am. & Eng. Enc. of Law, 2nd ed. 316.

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The evidence falls far short of establishing the relation of attorney and client, and counsel for the petitioner distinctly disavow any intention of charging the judge with lack of integrity. The following cases have been cited by the petitioner on the subject of judicial conduct and the necessity for public confidence therein: *Boswell* v. *Flockheart*, 8 Leigh 364; *Bowers* v. *Bowers*, 29 Grat. 697; *Louisville & N. R. Co.* v. *Taylor*, 93 Va. 226, also note 2 Va. Law Reg. 376; *Davis* v. *Beazley*, 78 Va. 491; *Bowden* v. *Parrish*, 86 Va. 67; *Corey* v. *Moore*, 86 Va. 721; *Moses* v. *Julian* (N. H.), 84 Am. Dec. 116; *Coal Co.* v. *Doolittle*, 54 West Va. 210; *Findley* v. *Smith*, 42 West Va. 299; *State* v. *Cottrell*, 45 West Va. 839; *State* v. *Hocker* (Fla.), 25 L. R. A. 117. There is also cited Constitution of Virginia, sec. 105; Code 1919, sec. 5975; *Berger* v. *U. S.*, 41 Sup. Ct. Rep. 230.

In the view we take of the facts of the case, it is unnecessary to review these or other cases on the subject. There is no charge here of proprietary interest in the subject matter of litigation, nor of relationship to the parties, nor of fraud or corruption, nor of lack of integrity on the part of the judge, but simply a charge of bias, or leaning of the mind of the judge to a certain conclusion upon a purely legal question which was decided at the trial of the first case, and which cannot again arise on the trial of the second case; and that the conduct of the judge in maintaining his view of the legal question had been such as to place him in the position of counsel for the Dutrows. As already stated, the evidence does not at all warrant the charge that the judge occupied such a position, but it does disclose conduct on his part that was indiscreet, unwise and injudicious, as is manifested by the present controversy. If he did not care to make his written opinion a part of his judgment, but wished counsel to have the benefit of it in the preparation of a brief in maintenance of his views, he should have filed it with the papers in the cause, so that it might have been accessible to counsel on both sides, and have refrained from further connection with the controversy which had passed

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from his jurisdiction and was then pending before this court. The record in this cause does not disclose any reflection upon the honesty, the uprightness, purity or integrity of Judge Haas, and certainly we should not have suspected any, but only a bias on a purely legal question that had been decided on the trial of the first case. It does not disclose any prejudice against the petitioner. Such bias does not disqualify Judge Haas from sitting at the trial of the second case between the same parties. After a careful examination of the question of law involved and a decision thereof, of course Judge Haas was biased in favor of his opinion, as was this court after it affirmed his judgment, but that did not disqualify either from sitting in another suit between the same parties, even if the same question was involved. Bias on a purely legal proposition, such as whether the jurisdiction of a case is at law or in equity, removed from prejudice against any of the parties, does not disqualify a judge from sitting in a case. Nor do we understand that counsel so contend, but their sole reliance is on the allegation that he acted as counsel for the Dutrows. This, we think, is plainly not sustained by the evidence.

The stability of our government is dependent upon the inflexible integrity of its courts, and the confidence of the public in the courage, the impartiality and the wisdom of the judges in the prompt administration of even-handed justice to every litigant. This confidence cannot be betrayed with impunity, and ought not to be impaired by reasonable grounds of suspicion. The action of a pure and upright judge may, however, give rise to a suspicion of partiality or prejudice, when the surrounding facts and circumstances are unknown, but which vanishes in the light of their disclosure. So also counsel, in the heat of litigation and in their zeal in behalf of their clients, sometimes become so satisfied of the correctness of their conclusions that they cannot be convinced of their error, and often attribute an adverse view to bias or prejudice. But when the incident has passed, and reason has resumed her sway, they usually

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find that they have been hasty in their judgment, and that the judge has been as pure in his motives and as impartial in his administration of justice as they would have him be. When this occurs, there should be none more ready than they to admit their error, and to correct, as far as possible, the erroneous impressions they have created. The petition for the writ of prohibition will be refused.

Refused.

FOY *v.* COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. INTOXICATING LIQUORS—Witnesses—Proper Oath—Evidence—Failure to Show Expected Answer—Record—Failure to Show Arraignment or Plea by Accused—Code, sec. 4889.

Error to Hustings Court of city of Portsmouth.

Affirmed.

Frank L. Wilson, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

The accused was tried by jury, convicted of violating the prohibition law of the State, and the judgment under review was entered accordingly.

There are but two assignments of error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The first assignment of error is that the trial court refused to allow a witness for the Commonwealth to be asked on cross-examination the question: "What is your religious faith?"

It is urged in argument for the accused that the object of the question "was to show that if the witness was of a

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certain religious faith, he was not properly sworn, and therefore was not under oath, and that his testimony was not evidence."

The record does not disclose how the witness was sworn, nor does it show what answer the witness would have made, nor that there was any avowal of what answer he was expected to make to the question.

It is well settled that an assignment of error to the refusal of the trial court to allow a witness to answer a question will not be considered on appeal, unless the record shows what answer was expected. *Washington, etc., Co.* v. *Goodrich,* 110 Va. 692, and a number of other Virginia cases on the subject which might be cited.

2. The remaining assignment of error is that the trial court should have set aside the verdict because it does not appear from the record that the accused was arraigned upon or pleaded to the charges contained in the indictment; the record showing merely that the accused was present when his case was called, and announced that he was ready for trial, whereupon, the Commonwealth having made the like announcement, the jury were sworn and the trial proceeded to the verdict and judgment.

This is a misdemeanor case. It is well settled that under the statute (sec. 4889, Code 1919), no arraignment or plea of the accused was necessary. *Bare* v. *Commonwealth,* 122 Va. 783.

The case will be affirmed.

Affirmed.

GARRETT *v.* RAHILY & MARTIN.

(*Richmond, March 16, 1922.*)

1. DETINUE—Automobile—Possession—Innocent Purchaser for Value Without Notice—Instructions.

Error to Court of Law and Chancery of city of Norfolk.

Reversed.

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A. Johnston Ackiss, for the plaintiff in error.

S. M. Brandt and *Moses Ehrenworth,* for the defendants in error.

PRENTIS, J.:

W. F. Garrett, defendant, complains of an adverse judgment entered in favor of Daniel Rahily and James R. Martin, partners, trading as Rahily & Martin, plaintiffs, in an action of detinue for a Jackson touring automobile.

The pertinent facts are, that the plaintiffs, who lived in Petersburg, were the general agents of the Jackson Motor Corporation, of Jackson, Mich., and on or about the 16th of March, 1920, appointed one L. N. Crawford, an automobile dealer in Norfolk, Va., their sub-agent for the sale of such automobiles. This agency contract required Crawford to purchase the machines directly from the manufacturers in Michigan, and to pay them therefor. On March 31, 1920, the plaintiff sold and delivered the automobile here involved in Petersburg to their sub-agent, Crawford, knowing that Crawford would take it to Norfolk for use in connection with his business, as they say, however, for demonstration purposes only. They reserved title thereto by a contract of conditional sale, which was recorded in the city of Petersburg, April 5, 1920, and thereafter, before its recordation in Norfolk, following negotiations opened by one of Crawford's clerks April 17, 1920, this automobile was sold by Crawford to Garrett, defendant, April 22, 1920, and according to his testimony, fully paid for.

Crawford, his vendor, had a place of business in Norfolk, and advertised Jackson automobiles for sale in his front window as well as in a local newspaper.

Uuder these circumstances, as is stated in the brief of the attorneys for the plaintiffs, it was a question for the jury to determine whether or not the defendant was a purchaser for value without notice, and they insist that the jury has properly found that he was not such an innocent purchaser. That it was a question for the jury is undoubt-

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edly true, and if they had been permitted by the trial court to consider this question, which is fairly raised by the evidence, this court would not have disturbed the verdict. It appears, however, that the trial court refused all of the instructions which were asked for, except one, which was granted at the instance of the plaintiffs, in this language: "If the jury believe from the evidence that the car in the possession of the defendant, Garrett, is the same car mentioned in the contract of March 31, 1920, then they should find for the plaintiffs." This instruction takes away from the jury the determination of every question involved in the case save the identity of the automobile with the car referred to in the conditional sale contract. Under the evidence in this case the jury should have been instructed that if the vendee was an innocent purchaser of the car for value and without notice, they should find in his favor, for the very elect might have been deceived into believing that Crawford, the dealer, owned it, while the wayfaring man, whether wise or unwise, would have been his easy mark.

The case is controlled by the doctrines so recently announced in the cases of *O'Neil* v. *Cheatwood*, 127 Va. 96, 20 Va. App. 108, 102 S. E. 596; *Boice* v. *Finance & Guaranty Corp.*, 127 Va. 563, 20 Va. App. 1, 102 S. E. 591; *General Securities Co., Inc.*, v. *Driscoll*, 271 Fed. Rep. 295.

Reversed and remanded.

GORDON METAL CO. *v.* KINGAN & CO., LTD., ET AL.

(*Richmond, March 16, 1922.*)

1. ACTIONS—Unlawful Detainer—Deeds—Construction—Rights of Grantee—Reservation of Right to Terminate Agreement—Code, secs. 5149, 5512.

Error to Law and Equity Court of city of Richmond.

Affirmed.

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S. A. Anderson and *Smith & Gordon,* for the plaintiff in error.

George Bryan, A. W. Patterson and *Thos. B. Gay,* for the defendants in error.

PRENTIS, J.:

This is an action of unlawful detainer, wherein the Gordon Metal Company was plaintiff, and Kingan & Co., Ltd., and the Southern Railway Company were the defendants. There was a verdict and judgment in favor of the defendants.

The facts are, that by agreement under seal, dated July 1, 1891, the Chesapeake and Ohio Railway Company, hereinafter called the C. & O., granted to Kingan & Co., Ltd., hereinafter called Kingan, the right to construct or cause to be constructed, a railroad track across the basin (or upper dock) of the C. & O., in the city of Richmond, beginning on the line of Fourteenth street and running by a curved line to Dock street, opposite to the end of Fifteenth street. This agreement requires such track to be maintained at all times in good order by the grantee, Kingan, and the space occupied thereby to be only such as is reasonably necessary for its construction and maintenance. It also provides for the occupancy and use of the land occupied by the track for ten years, subject to certain qualifications which it is unnecessary at present to recite, and thereafter until one year's notice in writing from either party to the other, and Kingan agreed to remove the track upon receiving notice from the C. & O. so to do. It was further agreed that Kingan might arrange with the Richmond and Danville Railroad Company to construct, maintain and operate the track, which company was bound to observe all of the requirements of the agreement binding on Kingan, and Kingan agreed that, all things being equal, it would route its business for Virginia points, and such business as went south via Virginia Junction by the C. & O. Pursuant to such agreement, Kingan and the Richmond

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and Danville Railroad Company entered into an agreement, under seal, dated July 31, 1891, whereby the railway company undertook to construct and operate such track and agreed to observe all of the covenants of Kingan under the agreement of July 1, 1891, with the C. & O. Pursuant to these agreements, the curved track, or switch, across the property of the C. & O. was constructed, and since has been used as a private siding for the accommodation of Kingan's business, and occasionally, apparently by consent, for other business. The Southern Railway Company, hereinafter called the Southern, became the successor in title of the Richmond and Danville Railroad Company as to the rights here involved. By the thirteenth clause of an agreement of November 2, 1899, between the Southern and the C. & O., the fourth clause of the agreement of July 1, 1891, between the C. & O. and Kingan as to the routing of the Kingan business was modified in the interest of the Southern.

By deed dated January 25, 1905, the C. & O. conveyed to the plaintiff (Gordon Metal Company) a certain parcel of land in the city, which included a portion of the strip occupied by this Kingan side-track, the remaining portion of such strip being the land of the Richmond Properties Corporation, which side-track was continuous, and crossed in a curved line both the property of the plaintiff and that of the Richmond Properties Corporation. This deed of January 25, 1905, to the plaintiff conveyed the land with general warranty, and this language was used therein, "together with all the right, title, interest and estate of the said The Chesapeake and Ohio Railway Company in and to the said land up to the east line of Fourteenth street, subject, however, to all the rights which the Mayo Bridge and Land Company, or other owner, may have acquired in the strip of land on the northeast corner of said lot above described, now occupied by a row of small brick buildings." The C. & O. also covenanted that it had the right to convey and for further assurance of the land. The deed also con-

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tains this language: "And whereas the said The Chesapeake and Ohio Railway Company has sold the property hereinbefore described to the party of the second part, the said property being no longer necessary or expedient to be retained for use in connection with said railway, and now requires, in accordance with the resolution hereinabove recited, the trustees in the several deeds of trust or mortgage hereinafter referred to to release said property from the lien thereof in order to give perfect title to the purchaser. * * * It is further expressly understood, covenanted and agreed that this conveyance of the said piece or parcel of land is made subject to the following terms and conditions, to-wit:

"1. The Chesapeake and Ohio Railway Company reserves from the operation of this deed all the existing rights of whatever nature belonging to the Southern Railway Company for the maintenance and operation of its track, or tracks, and structures upon, along, or near the piece or parcel of land hereinbefore described.

"2. The Chesapeake and Ohio Railway Company further reserves from the operation of this deed all the rights of the Kingan Company growing out of or in any way connected with the agreement bearing date the first day of July, 1891, and recorded in the Chancery Court of the city Richmond, Va., clerk's office, in deed book 144-C, page 359, for the maintenance, use and operation of the side track which passes through the northwestern portion of the lot hereby conveyed, and this conveyance is made subject to all the rights of entry and transit of Kingan & Co. and of the Southern Railway Company for the maintenance, use and operation of said side-track and trestles connected therewith."

On October 10, 1913, the plaintiff notified the defendants to remove the said side-track from its land on or before November 15, 1914, thus giving one year's notice, in accordance with the agreement of July 1, 1891, between the C. & O. and Kingan. The defendants refused to va-

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cate the premises, and thereupon this action was instituted to recover possession of the strip of land occupied by the said side-track.

The court, construing the contract, gave an instruction requiring the jury to find for the defendants, and refused an instruction presenting the contrary view of the plaintiff.

Several errors are assigned, but it is perfectly apparent that the decisive question which was presented to the trial court, and now to be determined here, is whether or not the deed of January 25, 1905, conveying the property, should be construed to grant to the Gordon Metal Company the right to terminate the agreement of July 1, 1891, between the C. & O. and Kingan, under which the side-track was constructed and has ever since been operated. Whether the trial court erred in the admission or rejection of evidence has become entirely immaterial, for whether admitted or rejected, the merits of the controversy are fully presented and must be determined by a construction of this conveyance of the C. & O. to the plaintiff.

The case has been thoroughly argued, and many propositions of law relating to the construction of written instruments have been presented and supported by authorities. These well-established doctrines are all helpful, but no one of them appears to us to be conclusive, for all discussions of the questions involved lead back to the provisions of the conveyance, which must determine this doubtful controversy.

It certainly cannot be doubted, and this is urged by the plaintiff, that the grantee in a deed for land conveyed without any words of limitation, usually succeeds to every right of his grantor therein, or, as expressed in Virginia statutes, such a deed passes the *fee simple*, or whole, estate or interest which the grantor had power to dispose of, unless a contrary intention shall appear by the conveyance. (Code 1919, sec. 5149.) It is likewise true that under Code 1919, section 5512, "a grantee or assignee of any land let to lease, or of the reversion thereof, and his heirs, personal repre-

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sentative or assigns shall enjoy against the lessee, his personal representative or assigns, the like advantage by action or entry for any forfeiture, or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor, or his heirs, might have enjoyed." So that this deed passes every right of the C. & O. to the plaintiff, unless a contrary intention is expressed therein. It is necessary, therefore, to consider and determine whether or not there was any intention on the part of the C. & O. to reserve its right to terminate the Kingan agreement, and to withhold from the plaintiff any such right, which was sufficiently expressed to be effective.

Reverting, then, to the clause which we have quoted from the conveyance to the plaintiff, and bearing in mind the then existing facts, we observe that it was not necessary in that instrument for the protection of the existing rights of Kingan and the Southern to refer to the switch or side-track. These had been fully secured, defined and limited by the agreement of July 1, 1891, which had been duly recorded. It is also observed that if the intention of the conveyance was simply to give the plaintiff specific notice of Kingan's contract, this precaution was taken, as is shown by the concluding language, in the clause under scrutiny, namely: that "this conveyance is made subject to all of the rights of entry and transit of Kingan & Co. and of the Southern Railway Company for the maintenance, use and operation of the said side-track and trestle connected therewith." When it is borne in mind that this deed was drawn and accepted under the advice of counsel, it seems to us at least suggestive that the grantor was not content merely to use language clearly sufficient to convey the property subject only to Kingan's rights. There are other words in the same clause of the conveyance, the meaning of which we must determine, for it is fundamental that, in construing written instruments, all the language used must be considered, and its true meaning determined if possible. What, then, is the significance of this other language—that is,

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that "the Chesapeake and Ohio Railway Company further reserves from the operation of this deed all the rights of the Kingan Company, growing out of, or in any way connected with, the agreement bearing date the first day of July, 1891, for the maintenance, use and operation of the side-track"—and why was it necessary to enumerate this among the conditions for the performance of which the plaintiff was required to sign the deed and expressly covenant that the conveyance was subject to certain terms and conditions? It is frequently helpful in determining the meaning of obscure and doubtful language to consider the surrounding circumstances and the probable motives of the parties, and, pursuing this inquiry, we find that the side-track here involved is a small part of a continuous track leading from the lines of the Southern, and, while the C. & O. has now no property interest either in the track or in the land upon which it is located, it was and is substantially interested in the business of Kingan & Co. They are large shippers over the lines of the C. & O. from the west into the city of Richmond, who receive and dispatch substantial quantities of freight, whereby the business and revenues of the C. & O. are greatly augmented. This supplies a motive to the C. & O. in making the conveyance, for desiring the continued maintenance of the side-track, because to destroy it will injuriously affect its own business. It is possible that this injury might be only temporary, but this does not change the fact that the C. & O. had a substantial motive for desiring the continued operation of this side-track.

Then consider the use of the word "reserve." While that is an appropriate word when given its obvious and technical meaning to indicate that the grantor (C. & O.) intended thereby to withhold something from the grantee (plaintiff), it is quite inappropriate and unnecessary if intended merely to preserve the existing rights of Kingan, which were already otherwise fully safeguarded. Then observe further that the C. & O. reserves something "from

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the operation" of the deed. That language seems to us to be most significant, for if the deed was intended not to operate in favor of the plaintiffs upon the rights of Kingan & Co. under the side-track agreement, it leaves those rights just as they existed before the conveyance was made, and while the land upon which the track is located belongs to the plaintiff, it has no right to terminate an agreement upon which its deed was not to operate. To reserve from the operation of a deed, appears to be the equivalent of excepting therefrom and retaining in the grantor some right, title or interest in the subject matter, which, but for such reservation, would pass thereunder to the grantee. To hold otherwise here would be to ignore the language used, to attach no significance thereto, and to construe the conveyance just as if it had been omitted. Express notice of the existing contract with Kingan was thereby given to the grantee, and, by excepting it from the operation of the deed, the right to change the existing status by the independent action of the grantee was apparently withheld.

We do not feel that any further elaboration of the question presented can clarify its manifest obscurities and difficulties, but, giving it our best thought and attention, our judgment accords with that of the learned judge of the trial court.

Affirmed.

GRAY *v.* COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1 CRIMINAL LAW—Change of Venue—Jury—Refusal to Quash the Venire Facias—Code, secs. 4895, 5992, 5993—Intoxicating Liquors—Evidence.

Error to Hustings Court of city of Portsmouth.

Affirmed.

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S. M. Brandt and *R. T. Thorp, Jr.*, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

There was in this case a trial by jury, resulting in a verdict finding the accused guilty of selling ardent spirits, as charged in the indictment, and fixing his punishment at six months in jail and a fine of $500.00. The judgment under review was entered accordingly.

There is no assignment of error which challenges the sufficiency of the evidence to support the verdict. Therefore, no statement of the facts touching the merits of the case is deemed necessary.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

This case was argued orally before us, along with the cases of *Rudd* v. *Commonwealth* and *Walker* v. *Commonwealth*, decided at this term of court.

1. The first and fourth assignments of error in the instant case (the first concerning the motion for a change of venue, and the fourth concerning an instruction asked by the accused and refused, but modified, and given by the court as modified), are precisely the same as the first and fourth assignments of error dealt with in the case last mentioned, of *Walker* v. *Commonwealth*, and we here refer to what is said in the opinion of the court in that case for the details of our holding in this upon such first and fourth assignments of error. It is sufficient to say here that we find no merit in either of such assignments.

2. The second assignment of error in the instant case concerns the refusal of the court to quash the *venire facias* by which the jurors were summoned to try the felony case of Joe Foster.

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This is the same *venire facias* which is involved in the *Rudd Case*, as the first *venire facias* awarded therein; and is the same *venire facias* as that which is involved in the *Walker Case*. In the instant case, as in the *Walker Case*, the jurors were all obtained from those in attendance upon the court who had been summoned by the *venire facias* to try the felony case of Joe Foster.

The assignment of error now under consideration is that the court erred in refusing to quash the *venire facias* last mentioned "for the reason that the said *venire facias* was not issued in accordance with sections 5992 and 5993 of the Code of Virginia, in that a greater number of talesmen were summoned than provided by section 5992."

It will be observed that this is a different assignment of error from those in the *Rudd* and *Walker Cases* on the subject of the *venire;* but it is equally without merit, although for a somewhat different reason.

Sections 5992 and 5993 of the Code do provide a method for the empanelling of juries for the trial of misdemeanor cases; but that is not the only method provided by statute for that purpose. As pointed out in the opinion in the *Rudd Case*, by the express terms of section 4895, jurors summoned to try a felony case, and in attendance upon the courts, are authorized to be used to constitute the jury to try any misdemeanor case to be tried at the same term of court. Thus, another method of obtaining juries for the trial of misdemeanor cases is provided for by statute. Either method may be used by the trial courts. The latter method was used in the instant case, as it was in the *Walker Case*.

There remains but one other assignment of error for our consideration in the instant case, and that is this:

3. It is alleged that the court erred in admitting in evidence the testimony of one Cohen to the effect that, on December 31, 1920, in a certain restaurant known as "Hogshead Station," in charge of one O. V. Foy, the said Cohen bought a drink of liquor; such testimony being in-

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admissible in evidence for the reason, as it is claimed, that the testimony did not tend to connect the accused with the alleged sale of liquor and did not show that the sale was made by a duly authorized agent of the accused or with his knowledge or consent.

There was other testimony for the Commonwealth, however, bearing on this subject. That testimony was given by this same witness, Cohen, and was to the following effect: Cohen testified that, on January 1, 1921, the very next day after the purchase of the drink of liquor by him of Foy in the restaurant above mentioned, as stated in his testimony objected to, he, Cohen, came again to the same restaurant and found the accused there and acting as if he were the proprietor of the business. That witness engaged the accused in conversation, and during the conversation the witness saw whiskey being sold. That witness asked the accused if witness "could have a bottle of corn whiskey," and the accused "called O. V. Foy, and Foy came over and brought the bottle of whiskey for him," and witness paid Foy $4.00 for it in the presence of the accused. That the accused told witness that he, the accused, "was the owner of the place, and that the name of O. V. Foy was just a blind * * *."

Such being the evidence, it is plain that the assignment of error under consideration has no merit in it.

The case will be affirmed.

Affirmed.

HALE v. COMMONWEALTH.

(*Richmond, March 16, 1922.*)

1. INTOXICATING LIQUORS—Sale—Indictment—Bill of Particulars—Meaning of "Ardent Spirits"—Evidence—Parsnip Wine.

Error to Circuit Court of Madison county.

Affirmed.

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Will A. Cook, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

BURKS, J.:

The plaintiff in error, hereinafter called the accused, was convicted of unlawfully selling ardent spirits, and was sentenced to pay a fine of $50.00 and to be confined in jail for a term of thirty days. The indictment was framed under section 7 of the prohibition act (Acts 1918, chapter 388, page 578), and is what is called an "omnibus indictment." The defendant called for a bill of particulars, and it was given to him in the following language: "That the Commonwealth expected to prove that John S. Hale did, on the 19th of February, 1921, sell ardent spirits, as alleged in the indictment." The accused objected to the bill of particulars on the ground that it was insufficient and was no more definite than the indictment itself. In particular, it objected that the accused should have been informed "what sort of ardent spirits" the Commonwealth accused him of selling. The objection is without merit. The prohibition act itself defines the meaning of the term "ardent spirits" (Acts 1918, chapter 388, section 1), and he is charged with knowledge of such meaning. It was not necessary to be any more specific. Nor was it necessary to state to whom the ardent spirits were sold. (Acts 1918, chapter 388, section 60.) *Clopton* v. *Commonwealth*, 109 Va. 813, and cases cited.

It is further objected that the verdict was contrary to the law and the evidence, in that "what was sold was not one of the enumerated beverages mentioned in the statute, nor shown to contain more than one-half of one per cent of alcohol by volume; that the word "wine," as used in the statute, means one of the commercial brands of wine, and not one of the forms of beverage to which word "wine" is loosely applied. *State* v. *Dennison* (W. Va.), 101 S. E. 458.

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While it is true that the accused testified in his own behalf that what he sold was "parsnip wine," and that "if you drank enough of it, it might make you feel it," the purchaser, testified on behalf of the Commonwealth that the accused "sold him two glasses of liquor * * * that he did not know what sort of liquor it was * * * that he believed it was either corn whiskey or apple brandy, that he felt it; that he did not know the smell of corn whiskey, or apple brandy; that he did not know anything about white grape wine, dandelion wine, or parsnip wine; he had never drank any; that he was never intoxicated; that the liquor he drank was intoxicating." This was quite sufficient to sustain the verdict of the jury, without enquiring whether the various kinds of domestic concoctions which pass under the designation of "wine" are *per se* within the terms of the statute. The judgment of the trial court will be affirmed.

Affirmed.

HARRISON *v.* GARDNER INVESTMENT CORP.

(*Richmond, March 16, 1922.*)

1. PRINCIPLE AND AGENT—Sale of Real Estate—Evidence—Contract of Sale Between Agent for Owner and Agent for Purchaser.
2. INSTRUCTIONS—Peremptory Direction—Construction of Contract—Code, sec. 6003—Evidence.

Error to Circuit Court of city of Norfolk.

Reversed.

J. Edward Cole, for the plaintiff in error.
Jas. G. Martin, for the defendant in error.

This is an action of *assumpsit,* instituted by W. H. Harrison, the plaintiff in error (hereinafter called plaintiff), against the Gardner Investment Corporation, the defendant in error (hereinafter called defendant), the declaration

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containing the common counts of a declaration in *assumpsit* at common law, the object of the action being to recover the sum of $500.00, money of the plaintiff alleged to have been "had and received by the defendant to the use of the said plaintiff."

The defendant pleaded the general issue of *non-assumpsit*, on which issue was joined. The following grounds of defense were filed by the defendant:

"Each and every defense which may be made under the general issue, and, in addition—

"That there is no privity between the parties to this case.

"That defendant acted merely as agent in the deal in question in this case.

"That nothing is due from defendant to plaintiff.

"That plaintiff has no standing or right of recovery in this case."

There was a trial by jury which resulted in a verdict for the defendant. The trial court entered judgment accordingly and the plaintiff brings error.

Certain facts appearing from the evidence seem to be uncontroverted. Such of those facts as are material may be stated as follows:

On August 1, 1919, the plaintiff, being at the time at Tutwiler, Miss., saw in a recent issue of a newspaper published in the city of Norfolk, Va., the following advertisement of property for sale:

"Fairfax avenue: Garage and lot—lot 25x125 feet; brick garage, tile roof, six garages renting for $42 month, and about fifteen or twenty more can be built; rental of these will be guaranteed. Price, $8,000; $2,000 cash, $2,550 *fix* years, $2,500 ten years."

The evidence does not show whether or not the advertisement had any name signed to it, of the owner, or agent of the owner of the property, or why the plaintiff connected the defendant with the subject. But the fact was that on seeing this advertisement the plaintiff cut it out of the news-

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paper and, on August 1, 1919, from said place in Mississippi, wrote the following letter to the defendant, inclosing therein the said newspaper clipping:

"Gardner Invest. Corptn.:

"I will take it. Write up papers and let me know how much you want till we can get papers fixed.

(Signed) "W. H. HARRISON."

The defendant did not reply to this letter.

Afterwards, on what date does not appear, the plaintiff wired to one W. L. Wagner, who was in the city of Norfolk, and who had money belonging to the plaintiff deposited in his hands subject to the order of the plaintiff, "to see" the defendant, the Gardner Investment Corporation, "in regard to this matter" and to "secure that property" by depositing with defendant money of the plaintiff of such an amount as the defendant might require, "until" (the plaintiff) "could get there." (Whether the authority to Wagner "to secure that property" limited him to merely making the deposit or commissioned him to enter into a contract as agent for the plaintiff, and, if so, what contract, are questions of inference left in doubt by the evidence, as hereinafter mentioned.) This telegram does not appear in evidence, nor does any witness undertake to give its language. The telegram was the only communication of the plaintiff to Wagner on the subject so far as appeared from the evidence. The plaintiff did not send Wagner any copy of the advertisement.

On receipt of the telegram, Wagner went to see the defendant, not as acting for himself, but as the agent of the plaintiff; and the uncontroverted testimony is express that the defendant then, and in all the transactions with Wagner subsequently, "knew" that Wagner "was dealing" for the plaintiff, and not for himself. But the defendant required Wagner to sign an agreement in writing in which Wagner was named as the purchaser, without mention of

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the fact that he was such as the agent of the plaintiff, and to deposit $500.00, both of which Wagner did; the uncontroverted testimony, however, being that the defendant knew at the time that the $500.00 deposited consisted of money belonging to the plaintiff "and were deposited according to instructions" (Wagner) "received from" (the plaintiff); and that Wagner was acting in signing the agreement as agent for the plaintiff, and not for himself; so that the agreement was made by Wagner for the sole benefit of the plaintiff.

The agreement referred to, so far as material, was in the following form:

"This agreement of sale made in triplicate, this 11th day of August, 1919, between Gardner Investment Corporation, agents for E. H. Odend'hall (hereinafter known as vendor), and W. L. Wagner (hereinafter known as the purchaser).

"Witnesseth: That for and in consideration of the sum of five hundred no/100 dollars ($500.00), receipt of which is hereby acknowledged, the vendor agrees to sell and the purchaser agrees to buy for the sum of eight thousand no/100 dollars, all that certain piece or parcel or lot of land described as follows, to-wit:

* * * *

"The purchase price to be paid as follows:

"First: The five hundred no/100 dollars ($500.00) cash above received to apply to the purchase price.

"Second: Two thousand four hundred no/100 dollars ($2,400.00) cash when the deed is delivered and full settlement is made.

* * * *

"Fourth: The purchaser further agrees to give a deed of trust to secure the payment of five thousand one hundred no/100 dollars ($5,100.00), evidenced by notes, bearing interest at the rate of six per cent per annum, payable semi-annually, as follows:

"One-half in five years, and one-half in ten years.

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"The vendor agrees to deliver the above property with a general warranty deed and the usual covenants of title signed and executed by all parties interested in the property, same to be prepared at the expense of the vendor.

"All taxes, insurance, rents and interest are to be prorated as of date of settlement, and settlement is to be made on or before September 1, 1919.

* * * *

"It is understood that Gardner Investment Corporation are the agents for the vendor, and he agrees to pay them a commission for making this sale of five per cent on the first five thousand dollars and three per cent on the balance of the total purchase price.

"It is further understood that should purchaser fail to consummate this contract, any amount paid will be refunded as liquidated damages at the option of the vendor * * *.

"Witness the following signatures and seals this 11th day of August, 1919.

(Signed) "GARDNER INVESTMENT CORP'N,
"Agents. (Seal)
"J. W. GARDNER, President. (Seal)
"W. L. WAGNER. (Seal)"

The plaintiff came from Mississippi by automobile. He engaged a certain title company to examine the title and represent him in closing the purchase of the property. On or about September 10, 1919, the attorney for Odend'hall, the owner of the property, had prepared a deed conveying the property to the plaintiff, not to Wagner, and had the deed with him duly executed and acknowledged, ready for delivery, and met the plaintiff at the office of the title company with a view to closing the contract. Meanwhile, the deed of trust and notes provided for by the agreement in writing aforesaid had been drawn by the title company, at the direction of the plaintiff, but in accordance with the "dictation" of the attorney for Odend'hall, the owner, as that attorney himself testified. This attorney further tes-

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tified on the subject of what occurred on this occasion, as follows: "We were about to go to the stage of carrying out the contract of prorating the taxes and the rents, and so on, when Dr. Harrison" (the plaintiff) "raised the objection then that the contract, as he understood it, provided that the garages were rented, and that the rents for the garages were guaranteed for a year." (It may be here noted that the agreement in writing aforesaid contained no provision as to the property being rented, or as to guaranteeing the rents, those references appearing in the advertisement only; so that the plaintiff could not have been here referring to said agreement in writing as "the contract," if he knew its contents.) The witness proceeded further with his testimony, as follows: "When he told me that, Mr. Odend'hall not being with me, I told them they would have to postpone the settlement, as I was not authorized by Mr. Odend'hall to carry out any such contract as that. Several (* * *) after that, Mr. Odend'hall came to my office and directed me to carry out the terms of the contract with this modification, that he was to allow Dr. Harrison one year's rent on those garages, I think, at $7.00 per month, and credit that as accrued interest on the back of the note. After receiving those directions, I went back to the title company, at the hour designated, and waited for about three-quarters of an hour, and Dr. Harrison did not put in an appearance."

On the subject of what occurred after he got to Norfolk, and at his meeting with the attorney for the owner, above referred to, when they failed to close the contract of purchase, the plaintiff testified as follows:

"In the first place, I understood I was to pay $1,500.00 more, but they wanted $2,400.00 more, I think it was. I passed that and was about—I did draw a check for $2,400, and then I found that the garages were not rented, that there were only three of them rented, and I tore the check up. That is my recollection.

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"Q. Did they show you a copy of any contract that had been made in relation to this property?

"A. Showed me a contract which says that the money shall be returned to me if not satisfactory. I think that is written in the contract."

Wagner testified on the same subjects as follows:

"Q. Please tell the court and jury what occurred as soon as he (the plaintiff) came here and found the condition of the property?

"A. We first went to the office of the Gardner Investment Corporation to take up the matter of transferring the title. There was some difficulty in finding out whether or not the garages were rented. It was finally decided that that matter would be settled later, and we adjourned to meet later in the office of the Guaranty Title and Trust Company in order to transfer the title to the property, but upon finding that the garages were not all rented the deal was postponed.

"Q. Was the deal consummated?

"A. No, sir.

"Q. Why was it not consummated?

"A. It was not consummated because the property was not as represented, and we didn't want it."

It was also shown in evidence as an uncontroverted fact that the defendant had the $500.00 in its hands at the time of suit, but had been instructed by Odend'hall not to turn it over to the plaintiff, and that at the time of the trial the defendant still had the money in its hands.

There are only three questions on which any conflict is perceived in the evidence. Those questions are: (1) Whether Wagner, by reason of the general terms of the telegram to him, was given such large discretion that he was authorized by the plaintiff to enter into the contract as expressed in the written agreement aforesaid, as agent for the plaintiff, so as to constitute that agreement the contract binding on the plaintiff? (2) Whether the conduct of the plaintiff, after he arrived in Norfolk and knew of

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the agreement in writing, was such that he ratified that agreement? and (3) whether, if such agreement was binding on the plaintiff as his contract, there was a breach of that contract on the part of the plaintiff?

There may be further questions in the case whether the refunding of the money paid, mentioned in the contract, means what is there said, and if so whether the option there mentioned goes to the refunding or merely to the effect thereof; or whether there was a meeting of the minds of the parties on the meaning of "retained" instead of "refunded," the word used in the writing, there being in such cases a mere clerical error and mutual mistake in using the word "refunding" instead of "retained." These may be questions of law, or mixed questions of law and fact, if fully developed by the evidence. They are not fully developed by the evidence in the record, and need not be further specifically mentioned.

Of the evidence bearing on the three questions of fact above stated, it is sufficient to say that the conflict is more in the inferences which may be contended should be drawn from the evidence than in the evidence itself; and what inferences should be drawn from the evidence, whether in favor of the plaintiff or defendant, upon these questions, are, under the circumstances, disclosed, controverted matters of fact, about which reasonable minds may reasonably differ in conclusions.

The action of the trial court on the subject of the instructions appears from the record to have been as follows:

"The following instruction granted at the request of the defendant is the only instruction granted. It was granted over the objection of the plaintiff, and the plaintiff excepted:

" 'The court instructs the jury that under the law it is the duty of the court—that is, the judge—to construe the written contract in evidence in this case, so construing said written contract in this case the court instructs you that the defendant is not liable to the plaintiff in this case.'

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"Before granting this instruction, the court stated to the plaintiff's counsel, in the presence of the jury, in response to objections to the instruction, which plaintiff's counsel argued:

"The Court: 'The defendant company is haled into court upon a claim that it has money belonging to plaintiff. Defendant admits having $500.00 paid him on account of property bought by a Mr. Wagner, with whom a sealed contract was entered into with one Odend'hall—neither one of these are parties to the suit. This contract has been admitted as evidence because defendant received the $500.00 in pursuance thereof. If the plaintiff, who is not a party to the contract, is permitted to recover, there is nothing to prevent Wagner, who is not a party to the suit, from proceeding on his contract in a separate action to recover the same $500.00.

" 'I feel constrained, therefore, to tell the jury that, under this contract and the evidence connected therewith, there cannot be a verdict for the plaintiff.' "

The following instruction was requested by the plaintiff, but refused by the court:

"The court instructs the jury, that if they believe from the evidence that the defendants advertised the garages on Fairfax avenue for sale, and that by letter in writing, August 1st, the plaintiff agreed to take the property, and in pursuance thereto instructed a deposit of a sum of money to secure the property until he could come on and close the deal, and that after he came on to close the deal he found that the property was not rented, as stated in the advertisement, and refused to close the deal on the ground of material misrepresentations, that he is entitled to have his deposit returned in this case, and they should find for the plaintiff."

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

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The questions presented for our decision by the assignments of error will be disposed of in their order as stated below.

1. Did the court err in refusing to exclude from the jury the agreement in writing between the defendant, as agent for the owner of the property, and Wagner, as agent for the plaintiff, as the latter undertook to act and as dealt with by the defendant as an actor in the matter, as shown by the uncontroverted evidence, although the last-named agency was not stated in the writing?

This question must be answered in the negative.

The defendant, according to the testimony in its behalf, received the $500.00 sued for, certainly partly, in pursuance of the provisions of this writing. The execution of this writing was one of the circumstances which attended the payment of this money into the hands of the defendant. Clearly, therefore, the writing was properly admissible in evidence as a part of the *res gestae*. Its effect as evidence —how far it would be relied upon by the defendant as authorizing it to hold the $500.00 sued for—was and is another question, dependent upon the question of fact whether the writing proved to be what the evidence for the defendant tended to show the defendant considered it to be at the time it received the money of the plaintiff, namely: a contract binding upon the plaintiff and under the terms of which the defendant had the right to receive and hold possession of the said money of the plaintiff.

2. Did the court err in granting the single instruction which was given the jury at the request of the defendant, which is set forth above?

This question must be answered in the affirmative.

In the argument of the assignment of error involving this instruction, it is urged that it was reversible error in the court to give it for the reason that it is a peremptory instruction, and hence in violation of the statute (section 6003 of the Code) forbidding peremptory instructions. But, as held in *Small* v. *Va. Ry. & Power Co.*, 125 Va. 416, that

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statute is not to be construed as applying to cases in which the verdict of the jury depends necessarily and exclusively upon a question of law, such as the legal effect of a deed or contract. The instruction in question contained merely the construction of the written contract by the trial judge. Therefore, it was not *per se* in violation of the statute just mentioned.

However, the instruction under consideration, when read in the light of the statement of the trial judge before the jury in explanation thereof, and in the light of the evidence in the case, in effect, told the jury that the writing above mentioned was a contract between Wagner and the owner of the property sold, and could not be considered as a contract between the defendant, as agent of the owner, and Wagner, as agent of the plaintiff, in any aspect of the case. The uncontroverted evidence before the jury was to the effect that if the writing was a binding contract at all, it was a contract between the parties last named, and not a contract between Wagner and the owner. The instruction was, therefore, erroneous, both because it took from the jury their consideration of the evidence on this pure question of fact, and because it embodied a conclusion of fact which was directly contrary to the uncontroverted evidence.

There is only one hypothesis upon which we could decline to reverse the case because of such erroneous instruction, and that is this: If the evidence was such that, regarding the agreement in writing as having been entered into by the defendant with Wagner, as agent of the plaintiff, the jury would not have been warranted in coming to any other conclusion than that the plaintiff was bound by such writing as his contract, either because (1) he had authorized Wagner to make it for him, or (2) he had ratified it after it was made; and further, that the plaintiff had unjustifiably broken the contract, and as a result had forfeited the $500.00. In such case, the instruction might be considered as harmless error. But the evidence before the jury on all three of those questions of fact (not to here mention the

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difficulties in the way of arriving at the result just referred to upon the meagre facts pertaining thereto appearing in the evidence), was such that they were seriously controverted questions of fact, about which reasonable minds may reasonably differ in conclusions. They are, therefore, peculiarly jury questions, and they should have been left to the decision of the jury, under suitable and proper instructions, if asked for by either of the parties. Hence, the instruction under consideration cannot be considered as harmless error, and the hypothesis mentioned cannot save the case from reversal.

3. The only remaining question presented by the assignments of error is whether the court erred in refusing to give the instruction set forth above, asked for by the plaintiff.

The instruction contains obvious defects. However—

As it is not probable that an instruction in this precise form will be asked for by the plaintiff upon a new trial, we deem what we have said above in general terms, in regard to the instructions which should be given upon a new trial, sufficient to dispose of the subject for all practical purposes should the issues and the evidence on a new trial be the same as upon the one already had, and we feel that it is unnecessary for us to say anything further concerning the precise instruction last mentioned, either in approval or disapproval of it.

The verdict and judgment under review will be set aside and annulled and a new trial, *de novo*, will be awarded the plaintiff.

Reversed.

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"When Court of Appeals may rehear and review case decided by it; when application therefor to be made; where rehearing, etc., to take place; where decision entered.—The Supreme Court of Appeals on the application of a party shall rehear and review any case decided by the said court if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing. If the case was decided within the last fifteen days of the term the application shall be made before the end of the said term or within fifteen days after the commencement of the next term, wherever held. In all other cases the application shall be made during the term at which the decision was made and within fifteen days after the entry of the judgment. Such rehearing and review may be at any place of session, and the judgment, decree, or order made thereon shall be entered on the order book where it is made, and if not made at the place of session where the case was pending at the time it was originally determined, it shall be certified to the clerk of the court at the place of session where the case was originally pending as aforesaid, who shall forthwith enter the same on his order book and transmit a certified copy thereof to the clerk of the court below to be by him entered as provided by section sixty-three hundred and sixty-nine." Code 1919, sec. 6372.

N. B.—All opinions printed in this number are subject to rehearings which may be granted under the above statute.

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*Elected to succeed Hon. Edward W. Saunders, died December 16, 1921. Judge West was seated February 1, 1922.

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VIRGINIA APPEALS.

ALTAVISTA COTTON MILLS, INC. *v.* LANE.

(Wytheville, June 15, 1922.)

1. CONTRACTS—Evidence—Instructions—Measure of Damages—Recovery for Services in Putting Business on Sound Financial Basis.
2. IDEM—Fraud—Concealment of Contract from Creditors and Stockholders—Estoppel—Corporations—Power to Contract—Entry on Minutes—Acceptance of Benefits of Contract—Informality of Execution no Ground of Defense—Public Policy.

Error to Circuit Court of Campbell county.

Affirmed in part; reversed in part.

Volney E. Howard and *Wilson & Manson*, for the plaintiff in error.

H. L. Hale, Harrison & Long and *Caskie & Caskie*, for the defendant in error.

WEST, J.:

H. L. Lane brought suit against the Altavista Cotton Mills, Incorporated, to recover $40,000.00 for services rendered in financing the corporation. The jury returned a verdict in favor of the plaintiff for $25,000, on which a judgment was entered in the Circuit Court of Campbell county for $25,000, with interest thereon from the 15th day of May, 1916, and costs. To that judgment a writ of error was awarded.

For convenience, the parties will be designated as plaintiff and defendant with respect to their positions in the trial court.

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In the summer of 1910, A. C. Hutchinson, a cotton-mill man, of Charlotte, N. C., came to Altavista, Va., and organized the Altavista Cotton Mills, Incorporated, with a capital stock of $300,000, divided into 1,500 shares each of common and preferred stock, at $100 per share. Hutchinson was elected president, and John E. Lane, a brother of the plaintiff, vice-president, although he was not a subscriber to stock in the company. Hutchinson subscribed $17,500, and entered into contracts with J. H. Mayes and Fred H. White, southern representatives of New England manufacturers of cotton-mill machinery, for the purchase of such machinery, on condition that the manufacturers would accept one-third of the cost of the same in stock of the company. The Altavista Land and Improvement Company, of which the plaintiff was the largest stockholder, donated a site for the proposed mill and subscribed for $50,000 of the stock of the defendant company, but the plaintiff did not subscribe in his own name for any stock in said company.

Hutchinson endeavored to sell the stock of the company, and succeeded in inducing a few of his friends in North Carolina to subscribe for small amounts, aggregating $5,000 to $6,000. Plans were drawn, and the construction of the buildings begun, but, due to a lack of funds, in December, 1910, was suspended. Hutchinson spent the winter of 1910-1911 in an effort to sell the stock of the mill, and, making a failure thus to finance the company, became despondent and committed suicide in April, 1911.

A meeting of the subscribers was held on April 24, 1911, for a general discussion of the affairs of the company, John W. Hutchinson, a son of A. C. Hutchinson, deceased, representing his father's interest and the other Charlotte, N. C., subscribers. C. E. Hutchinson, brother of the deceased and an experienced cotton-mill man, was also present. Failing in their efforts at this conference to induce the plaintiff to undertake to finance the corporation, C. E. Hutchinson was

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offered a salary of $10,000 a year to accept the presidency and undertake to finance it. This proposition was declined by Hutchinson.

The annual meeting of the stockholders was held May 10, 1911, at which all of the stock subscribed for was represented. At this meeting the plaintiff, H. L. Lane, was unanimously urged to finance the company and act as president. The stockholders present discussed with him the question of compensation for his services, should he undertake the work, and the sentiment of the meeting was that he should receive compensation on a basis of 10 per cent on the capitalization of the company, or a reasonable annual salary. The plaintiff refused to undertake the burden of financing the company, or of acting as president. Before the meeting adjourned for dinner, the following board of directors was elected: J. E. Lane, H. L. Lane, J. H. Mayes, Fred H. White, A. B. Percy, T. V. Elson and A. G. Bell, all of whom were present at the stockholders' meeting, though neither one was personally a subscriber to the stock of the company.

After dinner, J. H. Mayes, John Hutchinson, J. E. Lane, H. L. Lane and F. H. White, who represented nearly all of the shares of the stock which had been subscribed for, met in a room at the hotel in Altavista, where the plaintiff was urged to reconsider his refusal, and the same proposition was made to him which had been made to C. E. Hutchinson. Plaintiff refused to accept this proposition, but finally consented to undertake the financing of the company, with the understanding and agreement that he was to have full charge of the finances of the company, and, if he were successful in financing it, the company should pay him "a reasonable sum for his services;" and with the further understanding, since he was to receive pay for his services, that he would not accept the presidency or serve as a director of the company, to which latter position he had that day been elected. This being one of the propositions submit-

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ted to him by the stockholders at their morning meeting, the matter was considered settled. Plaintiff thereupon announced that Lane Brothers and Company, a corporation owned principally by him, would subscribe for $10,000 of the stock, and that his brother, J. E. Lane, would subscribe for a like amount.

At the close of the conference at the hotel, a directors' meeting was held, all the directors being present. It was reported to this meeting that H. L. Lane had agreed to undertake to finance the defendant company, and those who were present in the conference at the hotel went over, with the full board, what they had discussed and agreed upon in the conference. H. L. Lane resigned the position of director and R. L. Cummock was elected in his stead, and was also elected vice-president and general manager at an annual salary of $5,000. Cummock was invited into the meeting and stated he was a manufacturer, but made no "profession of being a financier," and he was advised that the financing had been arranged and was in the hands of H. L. Lane.

The defendant relies upon six assignments of error, as follows: The action of the court—

1. In granting instruction No. 1 offered by the plaintiff;

2. In giving plaintiff's instruction No. 2 and refusing to give defendant's instruction No. 6;

3. In refusing to give defendant's instruction No. 4 as offered, and the giving of the instruction as amended;

4. In refusing to give instruction No. 1 offered by the defendant;

5. In refusing to set aside the verdict because it is contrary to the law and the evidence;

6. In entering judgment in favor of the plaintiff for the sum of $25,000, with interest thereon from May 15, 1916, though the verdict returned November 18, 1920, did not allow interest.

The following are the instructions offered by the plaintiff and given by the court:

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1. "The court instructs the jury that if they believe from the evidence that the plaintiff had a contract as alleged, whether expressed or implied, with the defendant company, to finance the said company, and that the plaintiff performed the said contract on his part, and the said company received and enjoyed the benefits thereof, he is entitled to recover."

2. "The court instructs the jury that if you find for the plaintiff you shall assess his damages at such sum as you think his services are reasonably worth to the defendant company not exceeding the sum of $40,000.00."

The following are the instructions offered by the defendant:

1. "The court instructs the jury that, though they may believe from the evidence that the plaintiff had an agreement with some, or all, of the directors of the defendant company for compensation for his services, yet if they shall further believe from the evidence that, by plaintiff's suggestion or direction, no record was made of such agreement on the minutes of the board of directors, and that since May 10, 1911, when it is alleged such agreement was made, a number of the present holders of the stock of the defendant company have purchased their stock in ignorance of any claim of the plaintiff for compensation, then to enforce plaintiff's claim would operate a fraud upon such stockholders, and they must find a verdict for the defendant company."

2. "The court instructs the jury that if they believe from the evidence that the plaintiff, in performing the services for the defendant company, for which he sues in this action, was prompted thereto by the motive of conserving his own individual interests growing out of his holdings of stock in Lane Brothers Company and in Altavista Land and Improvement Company, who, in turn, held stock in the defendant company; or if they shall believe from the evidence that such services when rendered by interested

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parties, are customarily rendered without compensation, in the absence of an express contract for compensation, then the mere fact of his rendering said services was not sufficient to put the defendant company on notice that the acceptance of said service at his hands would imply an obligation on its part to pay for the same."

3. "The court instructs the jury that the mere acceptance of service or accommodation by one at the hands of another does not necessarily imply an obligation on the latter to pay the former for the service. In order to imply such obligation, the service or accommodation must be of such a character and be rendered under such circumstances (in the absence of a specific contract) as to put the latter reasonably on notice that compensation would be required. In other words, the nature of the service or accommodation and the circumstances under which the same is given must be such as to make the latter conscious, in reason, that an acceptance thereof would imply a promise to pay for the same."

4. "The court instructs the jury that, though they may believe from the evidence that the plaintiff entered into a valid contract or understanding with the defendant, by which it was agreed between them that any compensation he received for his services was to be contingent upon his succeeding in getting the mill on a sound financial basis, then, though they may believe from the evidence that the mill was subsequently gotten on a sound financial basis, yet unless they shall further believe from the evidence that the mill was placed on a sound financial basis as the result of the plaintiff's services, they must find for the defendant company."

5. "The court instructs the jury that the burden is upon the plaintiff to prove by a preponderance of the evidence that he had a contract, expressed or implied, with the defendant company; that he performed that contract, and is entitled to compensation under it, and unless the jury shall

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believe that the plaintiff has proven such a contract, and that he has performed it, and is entitled to compensation under it, by a preponderance of the evidence, they must find a verdict for the defendant company."

6. "The court instructs the jury that any losses which may have been suffered by the plaintiff through his connection with the business or financial transactions of Lane Brothers Company, or with Altavista Land and Improvement Company, cannot be considered by them in arriving at their verdict in this case."

The court gave instructions Nos. 2, 3 and 5 offered by the defendant, but refused to give instructions Nos. 1 and 6 offered by the defendant, and refused to give No. 4 as offered, but amended the same so as to read as follows:

"The court instructs the jury that, though they may believe from the evidence that the plaintiff entered into a valid contract or understanding with the defendant, by which it was agreed between them that any compensation he received for his services was to be contingent upon his succeeding in getting the mill on a sound financial basis, then, though they may believe from the evidence that the mill was subsequently gotten on a sound financial basis, yet, unless they shall further believe from the evidence that the mill was placed on a sound financial basis as the result of the plaintiff's services, they must find for the defendant company. But if the jury shall believe from the evidence that the services of the plaintiff materially contributed to the placing of the said cotton mill on a sound financial basis, then the jury may allow him therefor such sum as the evidence shows said services are reasonably worth, if they shall further believe that the said services so rendered were of such a nature and were rendered under such circumstances as to imply a promise on the part of the defendant to pay for the same."

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The objection urged against plaintiff's instruction No. 1 is that the plaintiff's evidence fails to show a valid contract with the defendant and that he did not sue upon an implied contract. For reasons which will appear herein, we are of opinion that the testimony shows a valid, binding contract between the plaintiff and defendant. The defendant cannot be heard to urge his second objection to instruction No. 1 for the reason that the question of an implied contract was put in issue by its eighth ground of defense, and by its instruction No. 5, which the court gave at its request. Its instruction No. 5, and plaintiff's instruction No. 1, contain substantially the same proposition. No. 1 says, if the jury believe the plaintiff had a contract, whether expressed or implied, they must find for the plaintiff, under certain conditions, and No. 5 tells the jury that unless they believe the plaintiff has proven that he had a contract, expressed or implied, they must find for the defendant. The first assignment is without merit.

Defendant admits that plaintiff's instruction No. 2 is "probably correct" as "an abstract proposition of law," but contends that it should have been amended, or that its instruction No. 6 should have been given, since without it the jury returned an "excessive verdict." The question of any losses suffered by the plaintiff through his connection with the business or financial transactions of Lane Brothers and Company, or with the Altavista Land and Improvement Company, was not in issue in this case, and the jury had been otherwise fully instructed as to the proper measure of damages.

This court held in *Nelson County* v. *Coleman*, 126 Va. 275, that the jury having been properly instructed as to the measure of damages, "the defendant was not entitled to another instruction forbidding the jury to consider an element of damage not claimed by the plaintiff." The second assignment is likewise without merit.

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The amendment which the court made to defendant's instruction No. 4 did not constitute reversible error, as it contained practically the same proposition touching plaintiff's right to recover on an implied promise, which was embodied in defendant's instruction No. 3, which was granted by the court. Besides, if it were error to tell the jury they could allow plaintiff for services which materially contributed to placing the mill on a sound financial basis, it was harmless, as the defendant admits that the mill was subsequently gotten on a sound financial basis, and there is sufficient evidence to warrant the jury in finding that it was placed on a sound financial basis as a result of plaintiff's services. The third assignment is also without merit.

As to the sixth assignment of error, the plaintiff confesses error and consents that the judgment be corrected by relinquishing interest on the principal sum found by the jury from May 15, 1916, to November 18, 1920, the date of the verdict.

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The fourth assignment involves the question of fraud, and will be considered along with the fifth assignment of error.

The defendant contends that the plaintiff suggested that no record be made in the minutes of the directors of the agreement between himself and the defendant company; that this suggestion was made with intent to defraud prospective purchasers of stock; that the defendant company, in pursuance of said suggestion, made no entry of the agreement, and that the plaintiff's concealment of his contract was a fraud upon the creditors and stockholders of the company, and against public policy, and enabled the company to practice a fraud upon its creditors and such purchasers of stock, "by holding out to the public a smaller indebtedness than it had," if plaintiff's claim is valid; and that the plaintiff is estopped to assert his claim in this suit.

We find in the record no evidence of fraudulent intent

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on the part of the plaintiff or the company. Plaintiff's compensation was contingent, and there was no occasion to mention it in the financial statement of the company until it became a liability. The plaintiff was neither a stockholder, director nor officer of the company and had no control over what should be entered upon the minutes of the company, his suggestion being that "no statement be made" of the arrangement with him.

The defendant failed to put A. G. Bell, the secretary, whose duty it was to keep the minutes, on the stand as a witness, and thus withheld from the court and jury facts within its knowledge.

Failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference sometimes denominated a "strong presumption of law" that the testimony of such uninterrogated witness would not sustain the contention of the party. 16 Cyc. 1062.

It appears from the testimony of the witnesses introduced by the defendant to show that stockholders purchased stock in ignorance of the plaintiff's claim that those testifying purchased their stock on the open market from other stockholders, *after* the plaintiff had completed his contract *and demanded settlement* of the company.

If, as charged, the plaintiff was responsible for the failure to enter his contract on the minutes of the directors, this in no way affected his right to recover, since there was no legal necessity for making such a record, and the law does not penalize a person for failing to do that which the law does not require to be done.

While it is the duty of a corporation to keep a record of the meetings of its directors, showing the date of the meet-

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ing and who were present, it is not essential to the validity or binding effect of acts done, or authority given by the board, that its votes or decisions be recorded, unless recordation is required by statute, charter or by-laws, and if no record is kept of the proceedings of the board of directors or trustees of a corporation, parol evidence is permissible to show what was resolved or done, and by what vote. 14-A Corpus Juris, p. 93.

Since, in the absence of charter or statutory limitations, the only essential difference between the power of a corporation and of an individual to contract rests upon the fact that a corporation must act through its officers or agents, a corporation in the absence of statutory or charter provisions need observe only such formal requirements in the execution of its contracts as are binding on an individual under similar circumstances. It is not necessary to show a formal execution of the contract unless the statute requires it, where there is other competent evidence of the terms of the contract and of the assent of the parties to it. It is necessary, however, to show in some form the assent of the corporation to the contract, but in the absence of statutory requirement such assent need not be shown by a formal vote, nor by entry in the minutes of a directors' meeting; nor is it necessary that a contract shall be made a matter of record, unless the statute or its charter so provides. 14-A Corpus Juris, p. 590.

As a general rule a vote or other action on the part of the board of directors need not be a formal resolution entered on the minutes or records of the corporation, unless it is expressly required, and when it is not a matter of record it may be proved by parol. Fletcher's Cyc., Corp., Vol. 4, pp. 440-52; *Handley* v. *Stutz*, 139 U. S. 417.

In the case of *Ten Eyck* v. *Pontiac R. R. Co.*, 74 Mich. 226, this is declared to be the law: "It is not necessary to the binding action of a board of directors that each member should take part in its deliberation. The general rule is

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that a majority of the members of the board constitute a quorum for the transaction of business, and a majority of the quorum have power to bind the corporation by their vote. * * * Had the board of directors engaged any other person to perform the services rendered by the plaintiff, no question could have been made about their liability to pay therefor. The services were performed by the plaintiff at the request of the board of directors and the law implies a promise to pay what they are reasonably worth, so far as they had not been fixed by the resolution of the board. * * * There is another consideration which leads to the same conclusion in this case. During the time for which plaintiff claims pay for services, the members of the board of directors were the only stockholders in the corporation. The resolution and motion above referred to as not appearing in the records of the corporation, had not only the sanction of the board of directors, but of each individual stockholder of the corporation; they could not be heard to complain as stockholders of their own action as directors, and none of them have complained."

Where a corporation accepts the benefits of a contract, it is held by so doing to have ratified the contract and waived any informalities in its executon.

A corporation which has received the consideration of a contract cannot defend against an action on the contract on the ground that the provisions of the statute, charter or by-laws prescribing the form of the contract, or the mode of executing it, were not complied with by the officer acting for the corporation in the execution of the contract. In other words, any informality in executing a contract is waived and cannot be set up as a defense where the corporation has accepted and retained the benefits of the contract. 3 Fletcher Cyc. Corp., p. 2445.

Judge Whittle, speaking for the court in *Meem* v. *Big Ax Pocahontas Coal Co.*, 117 Va. 770, said: "The contract in the present case was within the charter powers of the cor-

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poration, and was made with the knowledge and consent of a majority of both the stockholders and the board of directors, and, as the circumstances strongly tend to show, of the president as well, who owned the rest of the stock and was the only other director. In these circumstances, though the making of the contract in its inception may have been irregular, it was not a void act. It was done by the procurement of officers and stockholders, who possessed full power to have made the contract as an original proposition, and the defendant received the benefit. By their conduct those constituting the governing body of the corporation will be held to have waived such irregularity, and the defendant is estopped to rely on it as a defense."

In *Winston* v. *Gordon*, 115 Va. 899, this court said: "An act of an agent from which he derives no personal benefit, but which is done in good faith for the benefit of his principal, and which was apparently necessary and would redound to his benefit, will be held to have been ratified and acquiesced in, and thereby rendered valid upon slight evidence. This doctrine is as applicable to corporations as to other principals."

From a careful examination of the evidence, it plainly appears that the plaintiff's contract with the defendant company was legal and binding, and not against public policy, and that he has faithfully executed the same. He personally endorsed for the company and had his brother, John E. Lane, and Lane Brothers and Company and the Altavista Land and Improvement Company endorse for it. By the sale of stock and his arrangements for borrowing money, he raised nearly $400,000 to be used in building, equipping and operating the mill, saved the company from bankruptcy and finally got it on a paying and profitable basis. He continued his efforts to finance and bear the burdens of financing the defendant company until its obligations, which amounted to $142,600, were paid off in May, 1916.

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On April 12, 1911, a statement of the company's condition showed assets aggregating less than $39,000, and liabilities amounting to $5,681. And on May 10, 1912, one year after the plaintiff had undertaken to finance the company, its assets were $417,499 and its liabilities $173,000. In 1917, the company paid accumulated dividends, and has since that date continued the payment of dividends each year. The net profits for the year ending April 30, 1920, were $202,149.50, and the net surplus was $302,596.50. Just prior to his death, A. C. Hutchinson offered stock for sale at less than par value, and on the day this suit was instituted the market value of the stock was $300 per share. It was admitted by some of the defendant's leading witnesses who are stockholders in the company that without plaintiff's assistance the mill "could never have been started."

There is no error in the ruling of the court in granting or refusing instructions of which the defendant can complain.

We are of opinion that the defendant company was fortunate to secure the services of the plaintiff at $25,000, and that there is ample evidence to support the verdict of the jury.

The defendant in error, not being entitled to and having in this court relinquished his right to recover, interest on the judgment for $25,000 from May 15, 1916, to October 18, 1920, the judgment entered by the trial court will be reversed as to said interest and affirmed as to the principal sum of $25,000, with interest thereon from October 18, 1920, till paid. The plaintiff in error having substantially prevailed in the matter of interest, as aforesaid, judgment will be entered here in its favor for the costs incurred by it in this court.

Affirmed in part, and reversed in part.

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ATLANTIC COAST LINE RAILROAD COMPANY v. A. M. WALKUP COMPANY, INC. ET AL.

(Wytheville, June 15, 1922.)

1. CONTRACTS.—Principal and Agent—Authority of Agent—Actions—Joint Tort Feasors—Contribution—Remedy Over by One Defendant Against Another—Constructive Fraud—Final Judgment—Code, sec. 6365.

Error to Hustings Court of city of Petersburg.

Reversed in part; affirmed in part.

Wm. B. McIlwaine and *Bernard Mann*, for the plaintiff in error.

Munford, Hunton, Williams & Anderson and *D. C. O'Flaherty*, for the defendants in error.

WEST, J.:

In 1915, the Florida Railroad Commission entered an order requiring the Atlantic Coast Line Railroad Company, hereinafter called Coast Line, and the Seaboard Air Line Railway Company, hereinafter called Seaboard, to build a union station at the intersection of the two roads at Ocala, Florida, the station to be located on the Carmichael property, in the northwest angle made by the crossing of said roads.

On April 16, 1916, the railroad companies entered into an agreement with A. M. Walkup Company, Incorporated, hereinafter called Walkup Company, to erect the station for the sum of $15,500, to be paid one-half by each company. The work of construction, which, under the terms of the contract, was under the supervision of W. D. Faucette, chief engineer of the Seaboard, or his duly authorized representatives, was begun on April 26, 1916.

On July 1, 1916, Walkup Company received a telegram from Faucette ordering it to stop work. On July 3, 1916, the council of the city of Ocala held a special meeting to consider the proposed change of site of the union station to the Masters property, in the southwest angle of the cross-

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ing. The location of the Carmichael property being such as to create the necessity for the public to cross the main line and yard tracks of the Seaboard in reaching the union station, Vice-President Sedden, of the Seaboard, who was present at the council meeting, wrote the president of the city council on July 7, 1916, that his company would pay $15,000 on account of the Masters property, provided the city would, among other things, secure the Masters property for the Carmichael lot and $20,000, and secure the consent of the Railroad Commission for moving the station.

In consideration of a conveyance of the Carmichael property and the payment of $20,000, of which $15,000 was paid by the Seaboard and $5,000 by the Coast Line, the Masters property was conveyed to both roads in equal shares.

In August, 1916, after bids were received for the work, a contract was entered into between the Seaboard engineers and Walkup Company, "to take down the building as it then stood and remove it across the track and rebuild it to its then condition—to the same extent of completion that it was at that time," for $5,400. The contractor was not permitted, however, to resume work until June 20, 1917, and in the meantime the United States government had entered the war, and the price of labor and material had increased to such an extent that the contract could not be completed except at a loss.

In a conference, held June 18, 1917, at which the Coast Line was not represented, the Seaboard engineers in charge of the construction work agreed Walkup Company should be allowed an additional sum of $3,639.23 "to compensate for increased cost of labor and materials and other expenses which resulted from stopping the work on the union station in 1916."

Upon final completion of the building, there was due and unpaid to the contractor a balance of $3,552.25, with interest from May 28, 1920, which each railroad claimed the other owed, to recover which this suit was instituted against both companies.

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The jury returned a verdict in favor of the Seaboard and against the Coast Line for the amount claimed, and judgment was entered accordingly.

The case is before us upon a writ of error granted the Coast Line, and upon the motion of the Seaboard to be dismissed as a party to the petition of the plaintiff in error.

The contention of the Seaboard is that, under the original contract of April 16, 1916, each road was severally liable for fifty per cent of the cost of construction of the station on the Masters property; that the extra allowances of $5,400 and $3,639.23, aforesaid, were properly allowed thereunder by the supervising engineers, as a part of the cost of construction, and that it has paid its half under that contract. While the contention of the Coast Line is that, under said original contract, it is liable for only one-half of the original contract price, $15,500; that the allowances aforesaid were made under new contracts entered into between Walkup Company and the Seaboard engineers, without authority on their part to bind the Coast Line to pay any part of said allowance; that it has agreed to pay no part of the $3,639.23, and only $2,000 on the cost of removal, and has paid all it owes the plaintiff.

It is admitted that W. D. Faucette, supervising engineer, had authority, under the contract of April 16, 1916, to direct the work. When he, or his authorized representative, ordered the work stopped, he was acting as the agent of both roads, and his action in this respect has been ratified by both companies by their conduct in consenting to the change of location and in contributing money towards the cost of removing and rebuilding the station on the Masters property. The delay occasioned by this order resulted in damages to the contractor, for which both railroads are liable, under said contract of April 16, 1916. The adjustment, by the engineer in charge, of the contractor's claim for damages occasioned by the delay was reported to both defendants, and, while they disagree as to what portion each should pay, neither one contends that the allowance agreed upon was unreasonable.

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It is held in *Alleghany* v. *Teaford,* 96 Va. 372, that "a plaintiff may recover damages sustained by him for loss resulting from unreasonable delay on the part of the defendant in permitting him to perform his contract."

The written contract of April 16, 1916, does not provide for the taking down, removal and rebuilding of the station at a new location after it was partly completed, and contains nothing which can be construed, expressly or by implication, to bind either party to pay any portion of the expense incurred for that purpose.

The Coast Line gained nothing by the change of location, and refused at all times to pay one-half of the cost of the Masters lot, or one-half the expense of removing the station and rebuilding same thereon, and as soon as it learned that Engineer Faucette was attempting to bind the Coast Line to pay one-half the cost of removal under the original contract, his authority in that respect was repudiated by J. E. Willoughby, chief engineer of the Coast Line.

It plainly appears from the correspondence between W. D. Faucette, chief engineer of the Seaboard, and the Coast Line officials that the agreement was that, for cost of removal, the Coast Line would pay only $2,000, the city of Ocala having agreed to pay the remaining $700. Engineer Faucette acknowledges this in his letter of August 4, 1916, addressed to J. C. Muchison, general superintendent of the Coast Line, in which he says the Coast Line will pay $7,000 and no more—$5,000 on the Masters lot and $2,000 on cost of moving the station. In the same letter he says, as soon as permission can be obtained to go on the Masters property, he will have the contractor start moving the building, evidently relying on the city of Ocala, or the Seaboard, whose employee he was, to pay the $700, which the Coast Line refused to pay. The president of the city council of Ocala telegraphed W. L. Seddon, vice-president of the Seaboard, on July 21, 1916, as follows: "The city council will pay $700 for A. C. L., amount lacking for their part moving

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depot. Am taking matter up with Railroad Commission."

The testimony shows that the bid of Walkup Company for removing and rebuilding the station, which was accepted by the engineer, was not the only bid received for that work, President Nash, of the Ocala city council, having put in a bid for another contractor.

J. N. Locknane, secretary and treasurer of Walkup Company, testified that "this contract for removing the building over to the other site was a separate contract, of course, * * * and we proceeded under his (Faucette's) authority the same as we had done on the other work." Knowing they were working under a new contract, Walkup Company was charged with the duty of inquiring as to the extent of the authority of Engineer Faucette thereunder to bind the Coast Line.

On June 20, 1917, J. E. Willoughby, chief engineer of the Coast Line, notified W. L. Darden, assistant engineer of the Seaboard, that the Coast Line would pay only $2,000 of the cost of removal, and would pay that to the Seaboard direct. And on July 16, 1917, when Willoughby received contractor's estimate No. 4, the first after the work was resumed, he objected to the estimate, and on August 20, 1917, notified Walkup Company that the Coast Line would not honor vouchers for any portion of the $5,400, cost of removal, and that they must look to the Seaboard for payment of same. At this time sixty per cent of the station was yet to be completed, which gave Walkup Company ample opportunity to protect itself, if any action was deemed necessary on its part.

In view of the foregoing facts, it is clear that the work of removal and rebuilding was done under a new contract, and not under the contract of April 16, 1916, and the Seaboard engineers had no authority to bind the Coast Line to pay any portion of the $5,400, the Coast Line being liable for only $2,000, which it had agreed to donate on the cost of removal, and which it has paid, under a special agreement.

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The verdict is, therefore, contrary to the evidence, and will be set aside, but no new trial will be granted.

The Seaboard insists on its motion to be dismissed as a party defendant, and relies on the opinions of the court in *Walton* v. *Miller*, 109 Va. 210, 2 Va. App. 875, in which it is held that joint *tort-feasors* are jointly and severally liable, but that no right of contribution exists among them, or remedy over by one against the other; and that, if proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant without affecting his rights aganst the other. We do not regard this authority as controlling in the instant case, which is a suit upon contract, wherein we cannot say, under the evidence, that there exists no right of action, or remedy over by one defendant against the other; and if there be such right, it is proper that the Seaboard be retained as a party so that the court may attain the ends of justice.

The facts in evidence show that the Seaboard, acting through W. D. Faucette, its chief engineer, assisted by its vice-president in conducting the negotiations, made the contract of removal with Walkup Company and had full charge of the work. Being a *new* contract, it was in no way affected by the terms of the contract of April 16, 1916, requiring each road to pay fifty per cent of the cost of the construction of the station. Having no authority to bind the Coast Line to pay any portion of the $5,400 cost of removal, Engineer Faucette was necessarily making a contract for the Seaboard. As chief engineer of the Seaboard, he was in charge of all its building operations and was presumed to have authority to bind it in contracts made touching such matters. And at the time the agreement was made by him to pay Walkup Company $5,400 for cost of removal, Walkup Company was working under a contract said Faucette, representing the Seaboard, made with it for the erection of a station at Charlotte, N. C. It is held in *S. Am. Co.* v. *Ferrell-Bledsoe Furniture Co.*, 125 Va. 429, 18 Va. App.

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348, that "the principal is bound to the extent that he holds another out as having authority to act on his behalf."

When the Coast Line refused to pay more than $2,000 of cost of removal, the Seaboard secured the promise of the Ocala city council to pay the remaining $700, and the Seaboard has the same right to demand payment of the $700, with interest, from the city of Ocala that it had to collect the $2,000 from the Coast Line.

The Seaboard accepted the benefits of the contract made for it in its name by its engineer, Faucette, who had no authority to make a new contract for the Coast Line. Faucette, as engineer of the Seaboard, acting within the scope of his employment, dealt with the Walkup Company with respect to the removal work upon the same basis as under the contract of April 16, 1916, and that the Coast Line was liable to it for one-half of the cost of removal. Walkup Company relied upon this representation by Faucette and proceeded with the work of removal and undertook to hold the Coast Line for one-half of the amount due therefor. If the Coast Line pays one-half of it, the Seaboard will be benefited that much.

If there is no dishonest intent, but a false statement of a fact on which the other party acts to his injury, the *fraud* is *constructive*. *Stevens* v. *Alabama State Land Co.*, 121 Ala. 450.

In *Barwick* v. *English Joint Stock Co.*, L. R. 2, Exch. 259 (which was an action *in delicto* against a corporation for the misrepresentation of one of its servants), Willis, J., in delivering the opinion of the court, said: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of his service and for the

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master's benefit, though no express command or privity of the master be proved."

It follows that it is right and proper to require the Seaboard to pay the plaintiff the $700, with interest, which it cannot recover from the Coast Line, and which the city of Ocala promised to contribute toward the expense of removal, rather than to require Walkup Company to look to the city of Ocala, with which it had no contractual relations, for it.

Nothing in this opinion, or in the judgment of the court, is intended, or shall be construed, to be an adjudication of any claim which either the Coast Line or the Seaboard may have against the other, or which the Seaboard may have against the city of Ocala, Fla., on account of the building of the union station at Ocala.

In our view of the case, it is unnecessary to consider further the various assignments of error relied on by the plaintiff in error. There being no reason to believe that, upon another trial, any new or different evidence might be introduced which ought to affect the result, and the facts before the court being such as to enable the court to attain the ends of justice, we shall proceed to dispose of the case under section 6365 of the Code, and enter final judgment upon the merits.

For the foregoing reasons, we are of opinion, as already stated, that the verdict of the jury should be set aside, and also the judgment complained of; that the motion of the Seaboard to be dismissed should be denied; and that the plaintiff is entitled to recover from the Seaboard Air Line Railway Company the sum of $843.24, with interest on said $843.24 from May 28, 1920, till paid, and from the Atlantic Coast Line Railroad Company the sum of $2,709.01, with interest thereon from May 28, 1920, till paid, and its costs against said companies jointly. And judgments will be entered here accordingly.

Reversed in part, and affirmed in part.

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Reheard, Wytheville, June 15, 1922.

WEST, J., delivered the opinion of the court.

We are asked to reopen and rehear this case for reasons stated in the petitions of the Seaboard and the Coast Line, filed at Richmond. No questions are discussed in the petitions, however, which were not discussed and considered at the hearing of the case. But the former opinion has been amended so as to answer further some of the arguments urged in the petitions for a rehearing.

It appearing that an error was made in ascertaining the amount of the judgment to be entered against the Seaboard, the judgments heretofore entered herein will be so amended as to allow the A. M. Walkup Company, Inc., to recover of the Seaboard Air Line Railway Company the sum of eight hundred and forty-three and twenty-four-hundredths dollars, with interest at six per centum per annum from the 28th day of May, 1920, until paid, and from the Atlantic Coast Line Railroad Company the sum of two thousand, seven hundred and nine and one-hundredth dollars, with interest thereon from May 28, 1920, till paid, and its costs against said company jointly. To this extent, we have reviewed the case upon the petitions for rehearing, and in all other respects the rehearings are denied.

Rehearing denied.

BLANKENBAKER ET ALS *v.* EARLY ET ALS.

(Wytheville, June 15, 1922.)

1. WILLS—Construction—Residuary Clause—Life Estate—Partial Intestacy.

Appeal from Circuit Court of Madison county.

Reversed.

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John S. Chapman, for the appellants.

N. G. Payne and *Edwin H. Gibson*, for the appellees.

WEST, J.:

On June 20, 1887, Richard Early, of Madison county, in consideration of one dollar and natural love and affection, conveyed to his unmarried daughter, Virginia S. Early, 186 acres of land in Madison county, the deed containing the following clause:

"But it is expressly stipulated and agreed between the parties that the said Richard Early is to retain peaceful and quiet possession of said land for and during his natural life, and that after his death (and not till then) is the said Virginia S. Early to take possession of the above-described tract of land, and should the said Virginia S. Early die without leaving a legal issue of her body, the land here deeded to her is to revert back and become a part of my estate, to be divided as though it had never been deeded to her, but if she leaves a child or children, then it goes to it or them, as the case may be."

He also deeded each of his other six children a farm.

On June 24, 1887, Richard Early made and executed his will, the second clause of which is in the following words:

"Item the 2nd: I want my executor, hereinafter named, to sell all my real and personal estate that I have not *deed* to my children in such manner and on such terms as will be to the interest of those to be benefited by it, and the money remaining after the payment of all just claims against my estate, I give to my daughter, Mary F. Blankenbaker, one dollar, to Robert E. Early, the sum of two hundred dollars, as I think the land I gave him is not worth as *as* I gave the other children, the remainder of the money to be equally divided between six of my children, viz: Ann E. Henshaw, Thomas W. Early, Elvira L. Fletcher, Martha V. Bohannon, Robert E. Early and Virginia S. Early. The

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land I have given to my daughter, Virginia S. Early, she does not get possession of until after my death, and she must not bring in any claims against my estate for the past or during my life for services rendered. She has a list of articles that are in my house that I do not claim, and my executor must not interfere with them."

In the spring of 1888, Richard Early departed this life, leaving surviving him his seven children, and the said will was probated on April 26, 1888, in the County Court of Madison county. Upon his death, Virginia S. Early took possession of the 186-acre tract of land, and held and occupied it until some time in the year 1920, when she departed this life, "without leaving a legal issue of her body."

The bill in this case calls for the construction of item the second of the said will of Richard Early, deceased.

The circuit court held that Richard Early did not die intestate of the tract of land, containing 186 acres, conveyed by him to Virginia S. Early, with certain limitations and reversions, by deed dated the 20th day of June, 1887, but that the said tract of land, upon the death of said Virginia S. Early without issue, passed under item two of the said last will and testament of said Richard Early. The case is here upon an appeal from that decree.

The lower court took the view that item two was, in effect, a general residuary clause, and caught up any undisposed of estate belonging to the testator and vested the title to the 186-acre tract in the children named in the second item of the will, subject to the deed, aforesaid, to Virginia S. Early.

Where a party dies and leaves a will, the presumption is that he did not intend to die intestate as to any of his property; but where it is manifest from the express words of the will that a gift of the residuum is confined to a particular fund or description of property, or to some certain residuum, the residuary legatees will be restricted to what is thus particularly given. *Faison* v. *Middleton*, 171 N. C. 172, 88 S. E. 141.

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In *Lane* v. *Patterson,* 138 Ga. 710, 76 S. E. 47, it was said, where land was devised to L. for her life, and at her death to her children then living, and a subsequent clause of the will devised "all other lands," "not heretofore disposed of," that said last-mentioned clause did not dispose of any of the lands previously devised to L., nor any reversionary interest therein.

It is held in *Sink* v. *Sink,* 150 N. C. 444, 64 S. E. 193, that where, by direction of a will, certain real and personal property was sold to pay the testator's debts and certain legacies, and it was provided that any surplus which remained should go to the widow, this does not constitute her chief residuary legatee so as to vest in her the remainder of other property after her life estate therein.

Where definite portions of a definite fund are given to various persons and then the residue of that definite fund is given to some one else, the residue is as much a definite fund as any other part of the whole fund so given, and is not a residue in the ordinary meaning of that term. 24 Am. & Eng. Ency. L. (2d ed.) p. 701.

A testator is presumed to use the words in which he expresses himself in his will in their primary or ordinary sense, and in construing the will the words employed are to be taken in that sense, unless it is manifest from the context of the whole will * * * that the testator intended to use them in a different sense. 40 Cyc. 1396.

Where an ambiguity exists in a will, unless there is a manifest intention to the contrary, the presumption is that the testator intended that his property should go in accordance wih the laws of descents and distributions. 40 Cyc., p. 1412.

The primary consideration and rule of construction is to determine the intention of the testator from the language which he used. If the meaning of that language is plain, the will must be given effect accordingly. This rule is elementary, and to it all others are subordinate and sub-

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servient. If there be doubt as to the meaning, then the auxiliary or subordinate rule to be first applied, and the one of most usefulness and importance, is for the court to place itself as nearly as possible in the situation of the testator at the time of the execution of the will. *Penick's Ex'or* v. *Walker,* 125 Va. 274, 278, 18 Va. App. 192.

The defendants in error rely with great earnestness on the case of *Gallagher* v. *Rowan,* 86 Va. 823. The will in this case contains a general residuary clause, "all my remaining estate, real and personal, I give and bequeath to my dear wife * * *," and for that reason is not controlling in the instant case.

Item two of Richard Early's will does not contain a general residuary clause, but simply a clause authorizing and directing the executor to sell all his real and personal estate, with certain exceptions therein stated, and pay all his just debts and funeral expenses, and after paying certain legacies, "the remainder of the money to be equally divided between six of my children." The money so divided being clearly the money realized from such sale, the language quoted cannot include other lands or the money derived from the sale of other lands.

In ascertaining the testator's intention, we look first to the language used by him.

The words, "that I have not *deed* (deeded) to my children," clearly except from the operation of the will all the lands he had deeded to his children, regardless of the stipulations contained in the deeds. This construction is strengthened by his subsequent reference, in the will, to the *land* he had deeded to his son, Robert E. Early, and the *land* he had deeded to his daughter, Virginia S. Early. The word "land" as used by him evidently means the fee simple estate therein, as he uses the same language in reference to the tract deeded to his daughter as he does in reference to the tract deeded to his son, which was an estate in fee simple; and these facts are sufficient to rebut the presump-

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tion that the testator intended to dispose of his entire estate. He evidently had in mind the deed to his daughter, Virginia S. Early, and the possible reversion thereunder, and so worded his will as to exclude that reversion from its operation.

Not knowing his daughter would die without lawful issue, he preferred to die intestate as to the 186-acre tract rather than direct his executor to sell a contingent reversionary interest therein. And it would be a strained construction to hold that the testator intended to devise to his daughter, Virginia, an undivided one-sixth interest in the reversion in the 186-acre tract which could not take effect until her death, when he had already conveyed to her the life estate therein. If he had intended this result, he would have doubtless so provided in the deed itself, which was executed only four days before the will.

We are of the opinion that the decree complained of is erroneous; that the land in which Virginia S. Early had a life estate was not disposed of by said will of Richard Early, but at her death passed under the law to the heirs of said Richard Early; and that the proceeds of the sale thereof should be divided amongst the heirs of said Richard Early according to their respective rights.

For the foregoing reasons, the decree under review will be reversed, and the decree entered here which should have been entered in the court below.

BURKS, J., dissenting:

I do not concur with the court in its construction of the will of Richard Early. By deed bearing date June 20, 1887, Richard Early conveyed to his daughter, Virginia S. Early, a tract of 186 acres of land. The deed concludes with the following paragraph:

"But it is expressly stipulated and agreed between the parties that the said Richard Early is to retain peaceful and quiet possession of said land for and during his natural life, and that after his death (and not till then) is the said

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Virginia S. Early to take possession of the above-described tract of land, and should the said Virginia S. Early die without leaving a legal issue of her body, the land here deeded to her is to revert back and become a part of my estate to be divided as if it had never been deeded to her, but if she leaves a child or children, then it is to go to it or them, as the case may be."

He had conveyed other land to his other children about the same time. Four days after the deed to Virginia S. Early, to-wit, June 24, 1887, the testator executed his will, in the second clause of which he says: "I want my executor, hereinafter named, to sell all my real and personal estate that I have not *deed* to my children in such manner and on such terms as will be to the interest of those to be benefited by it." He then gives a pecuniary legacy of $1.00 to his daughter, Mary F. Blankenbaker, and $200 to Robert Early, and then says: "The remainder of the money to be equally divided between those of my children," naming them and including Virginia S. Early.

The courts incline very decidedly against adopting any construction which would result in partial intestacy unless absolutely forced upon them. This is especially true where the will contains a residuary clause, and very strong and special words are required to show that a testator did not intend to dispose of his entire estate. 2 Redfield on Wills, 115; *Gallagher* v. *Rowan*, 86 Va. 823; *Prison Association* v. *Russell*, 103 Va. 563.

In *Miars* v. *Bidgood*, 9 Leigh (36 Va.) 361, 370, it is said by Parker, J.: "There are many cases to show that property not intended to pass under a residuary clause, as where it is given to charitable uses, is void by the statute of mortmain (*Durour* v. *Matteaux*, 1 Ves. Sr. 320), or where the legacy lapses, or where the specific legatee cannot claim in consequence of fraud practiced on the testator (*Kendell* v. *Abbott*, 4 Ves. 803), does yet go to the residuary legatee. The cases of *Cambridge* v. *Rous*, 8 Ves. 14; *Bland* v. *Lamb*,

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5 Madd. 412, and several others cited in Roper on Legacies, chapter 24, section 1, are of the same character. Sir John Leech, in the case of *Bland* v. *Lamb*, observes that 'The question is not what the testator had in his contemplation, but what the words he has used will embrace according to their ordinary signification, which must prevail unless qualified by other expressions in the instrument.' Lord Elden, in afterwards affirming the decree, remarks in allusion to this rule, that it has sometimes operated directly contrary to the intention of the testator, but, notwithstanding, has been allowed to prevail." No particular words are necessary to constitute a residuary legacy. In the will in the case in judgment, after giving specific legacies, the testator directs how the remainder of the money is to be divided.

In looking at clause 2 of the will, we find that the testator directs his executor to "sell *all* of my real and personal estate that I have not *deed* to my children." What he directed to be sold was his estate in all of the property, real and personal, that he had not deeded. He did not forbid him to sell the lands which he had conveyed, but he was to sell his estate in the lands that he had not conveyed to his children. He had just four days before this reserved an estate in the land conveyed to his daughter, Virginia, and provided that, in the event that she left no issue, the land was "to revert back and become a part of my estate, to be divided as though it had never been deeded to her. The interest reserved by him in this deed was a part of his estate which he had not deeded, and when, by his will, he directed all of his real and personal estate to be sold, he must have included the estate reserved by him in the land conveyed to his daughter, Virginia. At all events, as said by Sir John Leech in the quotation above, the question is not what the testator had in his contemplation, but what the words he has used will embrace according to their ordinary signification, which must prevail. It seems to me that the words used in the will, according to their ordinary sig-

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nification, carry with it the estate reserved in the land conveyed to his daughter. The will under consideration presents very strong evidence that the testator did not intend to die intestate as to any portion of his estate, real or personal. He had conveyed lands to his several children, and to his daughter, Virginia, he had conveyed only a certain interest or estate in a tract of land, providing that under the contingency named in that deed, the land deeded to her should revert back and become part of his estate as fully as if it never had been deeded to her. Except as to the lands he gave to his other children, and the estate in the tract conveyed to his daughter, the testator directed the sale of all his real and personal estate. He did not die intestate as to any portion thereof, and he directed how the proceeds should be divided, and even if he did not have in mind the results of the distribution directed by him upon the death of his daughter, Virginia, without issue, still the words used by him carry a disposition of the remaining interest in that tract of land, and should be given effect.

Reversed.

BENNETT ET AL. v. GARRETT ET AL.

(Wytheville, June 15, 1922.)

1. MUNICIPAL CORPORATIONS—Incorporation—Petitions Opposing Proposed Incorporation—Parties Defendant—Time of Filing—Code, sec. 2883—Evidence—Objection—Insufficient Assignment of Error—Testimony as to Collateral Fact—Incorporation of Towns—Discretion of Trial Court—Part of Thickly Settled Community.

Error to Circuit Court of Arlington county.

Affirmed.

Chas. F. Harrison and *A. P. Payne*, for the plaintiffs in in error.

Wm. C. Gloth, E. W. R. Ewing and *H. R. Thomas*, for the defendants in error.

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KELLY, P.:

This is a proceeding by certain inhabitants of an incorporated community, known as Clarendon, in Arlington county, to obtain a town charter, pursuant to the provisions of chapter 116 of the Code. The application was opposed by numerous residents of the county living within or near the proposed corporate limits, and also by the board of supervisors.

Numerous grounds of defense were specified in writing, but the important ones are, (1) that the purpose of the petition is to segregate for incorporation a part only of a thickly settled community to the detriment of other parts thereof; (2) that the best interests of Arlington county as a whole will be prejudiced by the incorporation applied for; and (3) that the welfare of those living within the proposed corporate limits will be injuriously affected by the proposed incorporation.

A great mass of testimony was taken, all in the presence of the trial judge, and at the conclusion thereof the court entered a final order denying the prayer of the petition, and dismissing the cause. From that order this writ of error was allowed.

The first assignment of error complains of the action of the court in permitting counsel for contestants on the first day of the trial to file eight separate petitions signed by numerous residents of the county indicating their opposition to the application for the charter. It is insisted (a) that these petitions were signed by persons who had not properly come into the litigation as defendants; (b) that the cause had been pending for a long time, and the petitions ought to have been filed far enough in advance of the trial to enable the plaintiffs to investigate and ascertain to what extent the signers of these opposition petitions were interested; and (c) that the trial court must necessarily have been unduly influenced by the imposing array of names thus suddenly appearing in opposition to the charter.

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These positions are all wholly untenable. The first, as to parties defendant, is answered by the bill of exceptions upon which the assignment is based, showing affirmatively that "the several defendants" (manifestly referring to defendants already recognized as being duly in court) presented "eight separate petitions containing several hundred names, as will appear on pages * * *, and asked that they be made parties defendant to this proceeding, to the filing of which petitions the plaintiffs objected; which objection the court overruled and permitted the filing of said petitions." This, in effect, shows that these new petitioners asked, and were allowed, to come in as defendants; but if there be any doubt as to this proposition, the plaintiffs in error expressly rely upon a portion of the record at large (not embodied in the bill of exceptions last above mentioned, but appearing in another certificate) which shows that the court, in terms, held that the persons in question would be regarded as defendants. This was in accord with section 2883 of the Code, permitting any residents of the county, on motion, to have themselves made parties defendant. The statute prescribes no particular form in which the motion is to be made, and what the court did in this instance was a substantial compliance with the law.

As to the alleged injustice to the plaintiffs arising from the belated filing of the petitions, it is enough to say that, at the time they were offered, no sufficiently definite claim was made that the plaintiffs were being prejudiced by the alleged surprise, and no motion was made then for a continuance on that account. It was perfectly proper, in any view of the case, for the court to allow these petitions to be filed and these parties to become defendants in the cause. If the plaintiffs really felt that they were being placed at a disadvantage by the fact that these petitions came in late and without giving them time to duly consider the same before going into the trial, they ought to have made that point, and we will presume that, if the point had been

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fortified and sustained by good reason, the trial court would have continued or postponed the hearing. At any rate, by failing to make the motion and ask for the postponement or continuance, the plaintiffs waived the point.

As to the effect which these numerously signed petitions may have had on the court, we must presume that the trial judge was not unduly influenced thereby, but that he decided the case upon the evidence. No doubt, he gave some weight to the mere fact that so many residents of the county appeared in opposition to the charter, but this is as it should be, for the statute was not enacted with an eye single to the wishes and interests of those within a proposed incorporated area, but clearly intended to protect the welfare of the county and its inhabitants by allowing the board of supervisors or any residents thereof to come in and defend the application. The mere fact that a very large number of residents of the county opposed the incorporation is a proper matter for the consideration of the court, though, of course, it would have to appear in some way that their opposition was not merely whimsical.

Bill of exceptions No. 2 is as follows:

"Be it remembered that on the trial of this case the several defendants to sustain their several issues and during the taking of the testimony of J. Thomas Manning, a witness for petitioners (*i. e.*, plaintiffs), defendants asked said witness the following question, viz:

" 'And how would you raise the money for the putting of a school building? Would you do it by public subscription or any subscription?' To which question said witness answered: 'I did not say that. Mr. Lyons has made an offer, but as to what he will do remains to be seen.' Thereupon, counsel for defendants made the statement to witness: 'You said that you had a way—' Whereupon, plaintiffs objected to the question and moved the court to strike out all the evidence that had gone into the record regarding what would be done with the schools, if the community was in-

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corporated, on the ground that there was no law to compel any town to become a separate school district and take over the schools if it did not choose to do so. Which motion the court overruled for the time being, etc."

It is said that the question presented by this exception was as to the effect which the incorporation of the town would have on the schools. Certainly, nothing appears in the certificate as above quoted which could possibly have prejudiced the plaintiffs, because what the witness said, so far as there shown, had no significance of any kind. The motion to strike out, as set forth therein, was entirely too vague to be availed of in this court. The record before us covers nearly four hundred printed pages, composed chiefly of the testimony, and while we have read the same carefully with a view to determining the merits of the cause, we do not recognize any obligation upon us to search through the record to find out what was "all the evidence that had gone into the record regarding what would be done with the schools if the community was incorporated." Neither in the bill of exceptions nor in the petition is there any effort to point out this evidence, and the exception and assignment are, therefore, wholly insufficient. See *P. Lorillard Co.* v. *Clay*, 127 Va. 734, 748.

We will add, however, that the decision of this controversy could not, in our view of the case, be materially affected by, and does not vitally depend upon, the effect which the incorporation would have upon the schools of the town, and the point under consideration is, therefore, after all, immaterial. The case is controlled by considerations, as will hereinafter appear, which overreach any question affecting merely the schools, or any other matter relating only to the welfare of the locality proposed to be included within the corporate limits.

The trial court refused to allow Mr. Charles F. Harrison, one of the attorneys for the plaintiffs, to testify in substance that the town of Leesburg, with taxable values ap-

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proximately the same as would be included within the proposed new town, had been able to successfully finance its municipal government, and to provide its inhabitants with sewers, water, electric lights, paved streets, police protection, etc.; and this action is assigned as error.

The court was clearly right in excluding this testimony. It related to a collateral fact existing under conditions not shown to be substantially similar to those involved in the case at bar. *Ellis* v. *Harris*, 32 Gratt. 688; *Riverside Cotton Mills* v. *Waugh*, 117 Va. 386, 390; *N. & W. R. Co.* v. *Henderson's Adm'r*, 132 Va. —, 25 Va. App. 441.

The final and important assignment of error is that the court denied the relief prayed for, and dismissed the petition.

In matters affecting the interests and internal affairs and control of counties, cities and towns, we are always disposed to accord much latitude to the discretion and decision of the lower courts. These matters are peculiarly within their province and jurisdiction. They are presided over by able and impartial judges, who, by reason of their knowledge of local conditions, are in a far better position than we are to arrive at correct conclusions in such cases. Furthermore, in proceedings for the incorporation of towns, the statute contemplates that the trial judge shall, as he did in this instance, hear the evidence in person, and his decision is to be given especial weight upon questions of fact. *Norfolk County* v. *Portsmouth*, 124 Va. 639, 644.

The following is said in the petition for the writ of error: "The matters of defense seemed finally to focus on the one and the only *one ground* that was seriously argued, and the *one* that was stated by the court from the bench when judgment was rendered as the controlling reason for that judgment, and that was that, however much he might like to permit the incorporation, he was prevented therefrom by the authority of the case of *Board of Supervisors of Norfolk County* v. *Duke*, 113 Va. 94, which case furnished a pre-

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cedent that the court felt compelled to follow in the matter, in that said case decided that you could not incorporate a part of a thickly settled community. And the court considered Clarendon a part merely of a thickly settled community. This *one* ground of defense, which is numbered 'First' among the particulars of the defense (see page 556), was the all-controlling point that was the backbone of the defense and the basis for the judgment rendered. And it is an unsound defense and caused the court to render an unfair and an unjust judgment."

With the exception of the last sentence of the foregoing quotation, we wish to accept and adopt the same as a part of this opinion. The trial judge followed the *Duke Case* because he regarded Clarendon as only a part of a thickly settled community. He reached this latter conclusion upon the evidence, and from that conclusion we find no reason to dissent.

There is room under the evidence to doubt whether the incorporation of the town applied for would in fact, as claimed by plaintiffs in error, promote the interests of the inhabitants of the proposed corporate area, but conceding that the plaintiffs are right in this respect, and conceding further that a very large majority of such persons are in favor of the charter, the lower court found, and we think the evidence shows, that the general good of the whole community affected demands a denial of the petition.

The statute (Ch. 116 of the Code) provides that before a town charter is granted, the court must be satisfied "that the general good of the community will be promoted;" that the board of supervisors of the county, or any residents thereof, may become parties defendant and resist the application; and that "in every case the court may dispose of the matter as in its discretion may appear best." From these provisions, it is manifest that the law-makers intended to vest the widest discretion in the trial courts, and also that the latter were not expected to regard merely the

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wishes and interests of the inhabitants of the area proposed to be incorporated. It would be idle to give the board of supervisors and citizens of the community the right to come in, and yet hold that their interests are to have no weight; nor would there be any good reason for giving the court the power to decide "every case" in accordance with its discretion if in any case only the wishes of those within the incorporated area are to be considered. When the statute refers to the "general good of the community," the word "community" is not necessarily confined to the proposed corporate limits. If such limits are carved out of a thickly settled section, the word "community" must be construed as embracing the whole section. This was the effect of the decision in *Board of Supervisors* v. *Duke, supra,* and that decision controls this case.

Accompanying the record before us is a large map showing the country immediately surrounding and adjacent to the community known as Clarendon. From this map, and from the evidence, it appears that another community, known as Ballston, with about the same number of inhabitants, is situated quite near Clarendon. Indeed, the two communities are practically interlocked, it being only about one mile from the center of Clarendon to the center of Ballston. The proposed incorporation would take in a part of what is now Ballston and would omit another part of it. The residents of Ballston are opposed to the incorporation, and their interests would in all probability be seriously prejudiced thereby. Much the same consequences would result to other settlements in close proximity to Clarendon. The whole of Arlington county comprises a very small area, and it is densely populated. From the evidence in this case, it appears doubtful whether any small town could be chartered therein without detriment to the general good of the county.

We have not deemed it necessary to go into any elaborate discussion of the evidence. It is enough to say that, upon

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the whole case, we are clearly of opinion that the judgment of the circuit court was right, and should be affirmed.

Affirmed.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* GAYLE

(Wytheville, June 15, 1922.)

1. RAILROADS—Crossings—Collision—Instructions—Negligence—Excessive Speed—Duty to Look and Listen—Failure to Sound Warning—Negligence of Traveler—Mitigation of Damages—Evidence—Previous Failures of Electric Gong to Ring.

Error to Circuit Court of city of Williamsburg and county of James City.

Affirmed.

Henry Taylor, Jr., and *Lett & Massie*, for the plaintiff in error.

Henley, Hall, Hall & Peachy, for the defendant in error.

PRENTIS, J.:

A train of the Chesapeake and Ohio Railway Company, hereafter called the company, struck an automobile belonging to the defendant in error, hereafter called the plaintiff, at a crossing not far from the city of Williamsburg, on the public concrete road leading from Penniman to Williamsburg. This action followed, in which there was a verdict and judgment in favor of the plaintiff, of which the company is complaining.

The railway track is straight for about two miles east of the crossing, while the county road, as it approaches the railway tracks from the east, runs in the same general direction, converging with and crossing them obliquely, thus forming a sharp acute angle between the county road and the track going west. The railway track was depressed for

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a considerable distance east of the crossing, and the view of an approaching train from the county road was still further obstructed there by some weeds growing on the right of way, as well as by a field of corn growing on private property just at the apex of the angle. The automobile was new, held for sale by the plaintiff as a dealer, and was being driven by his agent, and the accident occurred at night. For the company, it is claimed that the headlight on the engine was a very strong one, that the statutory signals were sounded in strict accordance with the law, that a stationary crossing bell was ringing as the train approached, that it cannot be held liable because entirely free from negligence, and that the collision was solely due to the gross negligence of the driver of the automobile. On the other hand, the evidence for the plaintiff tends to prove that the signals required by law were not sounded; that the driver of the machine was lulled into a sense of security because the stationary warning bell was not ringing, and that he did not discover the approaching train until the danger was imminent and the injury unavoidable. This being the state of the evidence, the question is clearly one of fact for the determination of the jury, and their finding is conclusive unless there was some harmful error committed during the trial.

It is claimed by the company that there is such hopeless obscurity and conflict in the instructions that the verdict should be set aside for this reason.

Fourteen instructions were given, eight at the request of the plaintiff, and six upon motion of the company—certainly far too many in such a case as this in which the questions of fact were so simple and the questions of law so well settled. The jury would have been probably better aided by a single instruction presenting the conflicting views of the parties under the evidence; certainly, two would have been amply sufficient.

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The only instruction given for the plaintiff about which there can be any fair question, in our view, is No. 5, reading thus:

"The court instructs the jury that if you believe from the evidence that the crossing at which the accident complained of occurred was rendered dangerous by reason of the amount of travel over it, or by reason of obstruction to a clear view of the tracks, and that the defendant ran its train while approaching said crossing at an unreasonable and excessive rate of speed, or failed to sound its electric gong located at said crossing, and that such speed of said train or failure to sound said gong was negligence on the part of the defendant on account of the dangerous nature of the crossing, and if you further believe that such negligence was the proximate cause of the injury to plaintiff's car, then you may find for the plaintiff."

The objection to that instruction is the allusion therein to the fact that the train was running quite rapidly (the evidence shows the speed was fifty miles an hour), and that it submitted this to the jury as an act of negligence sufficient to justify a recovery. It is, however, noted that instruction "B" for the company expressly told the jury that the mere speed of the train is not *per se* evidence of the negligence of the company, and reading all of the instructions together, it seems to us that the jury could not possibly have misunderstood the true and decisive issues of fact submitted to them; those issues being whether or not the company was negligent in failing to sound the signals required by law, or because of the alleged failure of the electric gong located at the crossing to ring; or, on the other hand, whether the negligence of the driver of the machine was the cause of the injury. The excessive rate of speed referred to in instruction 5 is merely one of the attendant conditions. It is vigorously urged for the company, and with good reason, that if the driver of the automobile had been exercising ordinary care in approaching the crossing, the headlight of the train and the train itself

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could easily have been seen, notwithstanding the obstructions to his vision. If this is true, it may be also reasonably urged that the engineman should have seen the lights of the automobile as it gradually approached the crossing, and that, therefore, it was fair to direct the attention of the jury to the excessive rate of speed, because if the engineman did see the approaching automobile, it was at least his duty to take note of it, and if it appeared that the driver of the machine was unconscious of his peril, to reduce the speed of the train and bring it under control if possible. If, instead of putting the speed of the train and the failure to sound the electric gong in the alternative, the word "and" had been used, the instruction would have been unobjectionable under the facts of this case. The court gave for the company several very clear instructions, which the jury could hardly have misunderstood. They were clearly told that the burden was upon the plaintiff to show the negligence of the company, either in the failure to ring the crossing gong or to sound the statutory signals, and that the plaintiff could not recover unless this was proved by a preponderance of the testimony. They were further told that if the statutory signals were sounded and the agent of the plaintiff was guilty of negligence contributing proximately to the injury, they must find for the company. They were told that the driver had no right to proceed to cross the track without looking and listening for the train; that the greater the danger, the greater was the measure of his duty; that this duty continued until he reached the track, and that if the circumstances required it, he should have stopped and looked and listened in order to assure himself that no train was approaching, and that the plaintiff could not recover under the first and second counts of the declaration if the driver failed to perform his duty in this respect. They were further told that if the crossing gong was ringing as the driver approached the track, then his failure to hear the ringing of the bell or to see the ap-

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proaching train in time to avoid the injury was such negligence that the plaintiff could not recover on the first and second counts of the declaration, and that he could not recover under the third count if they believed from the evidence that the statutory signals were sounded. They were also told that if they believed that the negligence of the plaintiff's agent at the crossing was the proximate efficient cause of the accident, they should find for the defendant. *Washington & O. D. Ry.* v. *Zell*, 118 Va. 756, 11 Va. App. 622, 88 S. E. 309; *Canody* v. *N. & W. Ry. Co.*, 129 Va. 56, 22 Va. App. 9, 105 S. E. 585. Taking all of these instructions together, we conclude that, notwithstanding the apparent error in instruction No. 5, the jury could not possibly have misunderstood the issues submitted to them, that there has been a fair trial on the merits, and hence that such error does not justify a reversal. (Code 1919, secs. 6104, 6331.) *Standard Paint Co.* v. *Vietor*, 120 Va. 595, 13 Va. App. 543, 91 S. E. 752.

Code 1919, section 3959, provides: "If the employees in charge of any railroad engine or train fail to give the signals required by law on approaching a grade crossing of a public highway, the fact that a traveler on such highway failed to exercise due care in approaching such crossing shall not bar recovery for an injury to or death of such traveler, nor for an injury to or the destruction of property in his charge, where such injury, death, or destruction results from a collision on such crossing between such engine or train and such traveler or the property in his charge, respectively, but the failure of the traveler to exercise such care may be considered in mitigation of damages."

Applying this section, the court, at the instance of the plaintiff, gave instruction No. 1, as follows: "The court instructs the jury that the statute law of this State required the defendant to sound sharply the steam whistle of its engine twice at a distance of not less than 300 yards and not more than 600 yards from said crossing, and to ring

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the bell of said engine or blow the said whistle continuously or alternately until its engine had reached said crossing, and if you believe from the evidence that the defendant failed to perform any of its above-mentioned statutory duties, in any particular, and that the plaintiff's car was injured and destroyed by the engine or train of the defendant, then you shall find for the plaintiff, and if you believe from the evidence that the driver of plaintiff's car was negligent in any respect in approaching or attempting to cross said crossing, you should, nevertheless, find for the plaintiff, but you may consider the driver's negligence, if any, in mitigation of damages."

On motion of the company, the court also gave instruction "H," which reads thus: "Even if you believe that the plaintiff has established by a preponderance of evidence that the agents of the defendant did not blow the whistle or ring the engine bell, as provided by law, and that the plaintiff should be entitled to recover because of this omission, and if you further believe from the evidence that the plaintiff was guilty of contributory negligence under the other instructions of the court, then the court instructs you that you will reduce the amount of the actual damages established by him in proportion to the neglect or want of care attributable to him."

So that, although it sufficiently appears here that the driver of the machine was guilty of negligence which, before that statute was enacted, would have barred any recovery, now there may be a recovery, notwithstanding such negligence, if the company failed to give the crossing signals required by law, though the jury should consider such negligence in mitigation of damages.

The jury appears to have intelligently grasped the meaning of the statute as construed by the two instructions last quoted, for apparently they found both the company and the plaintiff's driver guilty of negligence, but, in obedience to instruction "H," undertook to "reduce the amount of the

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actual damages established by him (the plaintiff) in proportion to the neglect or want of care attributable to him." The plaintiff showed that it was a new automobile, having a ready market or sale value of $2,478.60; that its salvage value was about $500, and that it would cost from $1,600 to $1,700 to restore the car as nearly as possible to its former condition. The verdict of the jury was for $1,235, which indicates that both parties were held to be negligent, and that the damages have been mitigated or reduced in proportion to the negligence fairly attributable to the plaintiff's agent, the driver of the machine.

There are also exceptions to the introduction of certain evidence as to previous occasions on which the electric automatic gong at the crossing failed to ring the alarm when a train was approaching. It is sufficient to say as to these exceptions, that it is a matter of common knowledge that electrically operated automatic devices do get out of order at times and fail to operate. The court, in this case, limited the inquiry to a very recent period before this occurrence, and even if the evidence admitted was too remote in point of time, the error, if any, must be regarded as harmless.

Our conclusion then is to affirm the judgment.

Affirmed.

COLBERT v. M. W. CALLAHAM & SONS.

(Wytheville, June 15, 1922.)

1. APPEAL AND ERROR—Bill of Exceptions—Certification of Portion of Evidence—Measure of Damages—Code, sec. 6339.

Error to Circuit Court of city of Lynchburg.

Writ dismissed.

Jno. D. Easley and *E. Thurman Boyd*, for the plaintiff in error.

J. R. Caskie, for the defendant in error.

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PRENTIS, J.:

The plaintiff in error instituted his action against M. W. Callaham & Sons, a copartnership, alleging that he had suffered serious personal injury through the negligence of the defendants, growing out of a collision with a motor truck of the defendants while the plaintiff was riding a motorcycle. The defendants denied their own negligence and pleaded the contributory negligence of the plaintiff. There was a jury trial upon the issues thus raised, and a verdict in favor of the plaintiff for $50.

The only error assigned is that the damages are grossly inadequate.

The defendants moved to dismiss the writ of error as improvidently awarded upon several grounds. One of these grounds is that no proper bill of exceptions has been signed.

It appears that the defendants made no motion to set aside the verdict, while the plaintiff moved to set aside so much of the verdict as fixed the amount of the damages, and to award him a new trial upon the sole issue of the quantum of his damages. This motion was overruled by the court, and thereupon the defendant presented a bill of exceptions which does not certify all of the evidence adduced by the parties upon the issues raised by the pleadings, but only certifies the evidence relating to the quantum of damages.

The statute, Code 1919, section 6339, provides that, with the petition for a writ of error, "there shall be a transcript of the record of so much of the case wherein the judgment, decree, or order, is as will enable the court, or judge thereof in vacation, to whom the petition is to be presented, properly to decide on such petition, and enable the court, if the petition be granted, properly to decide the questions that may arise before it." So that the motion to dismiss the writ must be sustained if this statute has not been complied with, and it has not been complied with unless enough of the evidence is certified to enable this court properly to decide the questions arising.

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The defendants are not here assigning any error or asking any relief, and the plaintiff argues therefrom that they are concluded upon the question of their liability, and hence that the only evidence necessary before this court is that relating to the inadequacy of the damages. This proposition may appear to be logical, but a closer examination and reference to the authorities will show that it is not. It may be that the reason the jury awarded only nominal damages was because they could not agree that the plaintiff was entitled to recover, and that, in substance and effect, it was a mere compromise of their differing views made by the jury for the purpose of ending the litigation. Juries frequently regard realities as more important than logic, and courts may sometimes wisely follow their good example in this respect. That the defendants did not move to set aside the verdict is easily understood, if they construed it to be a vindication of their defenses to the action, and determined that, although they maintained that they were not responsible for the plaintiff's injury, inasmuch as a new trial would cost more than the amount of the verdict, they would accept the result as a substantial victory.

He who alleges error in the judgment of a trial court should come prepared to show it by the record, and this he can rarely do unless he places the facts before this court substantially as they appeared at the trial, because unless affirmatively shown, there is a presumption that the trial court committed no error.

So, in this case, without the entire evidence upon which the verdict and judgment were based, we are unable to determine whether or not there was error, for it does not appear from the incomplete record before us that the plaintiff was entitled to recover anything. That the general rule is that a bill of exceptions must either state or show by clear inference that the evidence which is certified is all of the evidence; because otherwise this court will not know upon what grounds a trial court based its judgment, and hence

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that it will be presumed to be right, is assumed in *Manchester Loan Asso.* v. *Porter,* 106 Va. 533, 56 S. E. 337, citing *McArthur* v. *Grigsby,* 84 Va. 159, 4 S. E. 369.

There are many precedents for the view that where the evidence is not all before the appellate court, a new trial will not be granted on the sole question of damages, as well as for the proposition that unless it appears affirmatively that the plaintiff is entitled to recover substantial damages, a verdict for nominal damages will not be set aside, but will be treated as in the nature of a verdict for the defendant. *McNeil* v. *Lyons,* 20 R. I. 672, 40 Atl. 831, 8 Am. & Eng. Ann. Cas. 906, note; *Olek* v. *Fern Rock Woolen Mills,* 180 Fed. 117; *Doody* v. *Boston & Me. R. Co.,* 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C 850, note; *Simmons* v. *Fish,* 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D 588, 8 R. C. L. 682, 20 R. C. L. 285.

We do not think it necessary to discuss the other interesting questions referred to in the briefs. Our conclusion is that the record does not disclose all of the evidence upon which the jury and the trial court acted, and hence that the writ was improvidently awarded because from the facts which do appear the verdict must be construed to be in favor of the defendant.

Writ dismissed as improvidently awarded.

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COMMONWEALTH EX REL. CITY OF PORTSMOUTH v. PORTSMOUTH GAS COMPANY.

(Wytheville, June 15, 1922.)

1. MUNICIPAL CORPORATIONS.—Grant of Franchise—Use of Streets, Etc.—Public Service Company—Charter—Duration—Construction by Parties—Indefinite Period—Consent of Municipality to Use—Code, 1849, ch. 56, 57.
2. IDEM.—Charter of Public Service Company—Effect of Extension—Const., secs. 124, 125, 158.

Error to Hustings Court of city of Portsmouth.

Affirmed.

Mann & Tyler, for the plaintiff in error.

Goodrich Hatton, for the defendant in error.

KELLY, P.:

The Commonwealth of Virginia, at the relation of the city of Portsmouth, in April, 1918, filed in the Hustings Court of that city an information in the nature of a writ of *quo warranto* against the Portsmouth Gas Company, alleging that the company, "from the 18th day of February, 1914, and ever since, has exercised the privilege or franchise not conferred upon it by law to use the streets, lanes and alleys of the city of Portsmouth, for the purpose of laying gas mains and pipes to distribute gas for public and private lighting and heating, and for power."

The respondent interposed a demurrer to the information, which was sustained, and thereupon, the plaintiff not desiring to amend, the court entered the order now under review, adjudging "that the Portsmouth Gas Company from the eighteenth day of February, nineteen hundred and fourteen, and ever since that time, was not in the exercise of a privilege or franchise not conferred upon it by law to use the streets and alleys of the city of Portsmouth for the purpose of laying and maintaining its gas mains and service pipes to distribute gas for public and private use. And

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that the charter of the Portsmouth Gas Company, by successive amendments having been extended to a period without limit, the said Portsmouth Gas Company is legally in the exercise of a franchise to use the streets and alleys of said city for said purposes so long as the Portsmouth Gas Company may continue in existence, the court doth order that the demurrer to said information be, and is hereby, sustained. * * * And * * * that said information * * * is dismissed."

The material allegations of the information, other than as above set out, are as follows:

That Portsmouth was incorporated as a town by the Colonial Assembly in 1752, and as a city by the General Assembly in 1858;

That on September 6, 1853, the council of the town of Portsmouth passed the following resolution:

"Whereas, Messrs. Perdicaris and Hoy, of Trenton, N. J., have expressed to the council their desire to erect, for the use of the citizens of the town, a suitable set of gas works, provided the authorities of the town and its citizens will give them protection and encouragement; and whereas the council of Portsmouth desires to give Messrs. Perdicaris and Hoy a proof of the favor with which they will regard the erection of gas works to supply the citizens with a cheap, beautiful and much-needed light; therefore, be it resolved,

"First. That the town of Portsmouth do grant unto Messrs. Perdicaris and Hoy and, through them, to the 'Portsmouth Gas Company' the *exclusive* privilege for the space of fifteen years from the completion of the gas works in the said town, of opening the streets and alleys of the town for the purpose of laying street mains and service pipes through them; the opening and closing of said streets and alleys to be done with all reasonable dispatch, and the said streets and alleys to be forthwith repaired and left by the parties opening them in the same good order and condition as before, at their own expense.

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"Second. That the town of Portsmouth will exempt from town taxes the property of said contemplated gas works for the space of ten years from the going into operation of the same.

"Third. That the town of Portsmouth will pass all legal and proper ordinances to protect the said gas works and property from injury.

"Fourth. That on the completion of said gas works, the town of Portsmouth will contract for the lighting of such number of public lamps as the council may deem proper and the interest of the town may require.

"Fifth. That should the said Perdicaris and Hoy fail for six months to proceed to erect their gas works, and complete them with all practical dispatch, or should the gas furnished by said works when in operation be inferior in quality to, or furnished at a higher charge to the consumers per thousand feet than that furnished by the gas works in the cities of Norfolk or Richmond, then the town of Portsmouth, at any and all times, reserves the right to annul the whole or any portion of the foregoing resolutions, and revoke the privilege hereby granted."

That on November 1, 1853, the town council, by another resolution, extended the time within which the gas works were to be commenced and completed, and also made certain alterations as to charges for and quality of gas to be furnished;

That the foregoing resolutions constitute all the formal corporate action by the municipality, except as hereinafter set out, giving consent of the corporate authorities for use by the gas company of the streets and alleys of the town;

"That, within the time limit specified in said resolutions, the said Perdicaris and Hoy and the Portsmouth Gas Company proceeded to erect gas works and to lay mains in the streets and alleys of the town of Portsmouth, and ever since the fall of 1854 has been, and now is, using the streets, alleys and lanes of said town or city to furnish gas to the

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inhabitants of the town and of the city of Portsmouth, and has continuously during said period, pursuant to contracts made between the Portsmouth Gas Company and said town and city in accordance with resolutions passed by the councils of said town and city, furnished gas for the streets and public buildings of the municipalities of the town and city of Portsmouth;

"That in the year 1854, the General Assembly of Virginia passed an act to incorporate the Portsmouth Gas Company, by act approved on the 11th day of February, 1854, authorizing the Portsmouth Gas Company to use the streets, alleys and lanes of the town of Portsmouth without regard to the consent or dissent of the council of said town or city, except as to the repair of the streets, lanes and alleys which may have been opened for the purpose of laying the said pipe, as will be seen by Acts of the General Assembly of Virginia 1853--4, page 86;

"That this charter, with all the rights therein granted to the streets, alleys and lanes of the city of Portsmouth expired by its terms on the 11th day of February, 1884;

"That on the 19th day of February, 1884, the Portsmouth Gas Company applied to the General Assembly of Virginia for an amendment, re-enactment, extension and renewal of its charter, and the same was granted for a further period of thirty years from that date, as will be seen by the Acts of the General Assembly of Virginia 1883-4, page 169;

"That the corporate existence, together with the rights granted to said company in and to the streets, alleys and lanes of the city of Portsmouth by this latter act of the General Assembly of Virginia, expired on February 19. 1914;"

That on the 17th day of May, 1911, "the Portsmouth Gas Company, recognizing that their corporate life and the rights therein granted would expire by limitation on the 19th day of February, 1914, applied to the State Corporation Commission of Virginia for the purpose of extending

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the charter of said corporation for a period without limit; and that in pursuance to said application the Corporation Commission of Virginia issued and certified to the secretary of the Commonwealth an amendment to the charter of the said The Portsmouth Gas Company, extending its corporate life to a period without limit;"

That the above-recited extension of the charter was procured by the company without compliance on its part with sections 124 and 125 of the Virginia Constitution of 1902;

That all the rights of the gas company in and to the use of the streets and alleys of the city not permitted to the general public ceased and determined on the 19th day of February, 1914, and that the action of the State Corporation Commission in granting an extension of the charter did not confer upon the company any rights in the streets and alleys not permitted to the public generally;

And, finally, that the gas company, by applying for and accepting the amendment to its charter on May 17, 1911, "thereby surrendered every exclusive and nonrepealable right which it enjoyed, and agreed thereafter to hold its charter, rights, privileges and franchises subject to the provisions of the Constitution of Virginia, especially sections 124 and 125. See section 158 of the Constitution of Virginia and Acts of the General Assembly of Virginia, 1902-3-4, page 437, section 1105-a, clause 8, Pollard's Code 1904."

The legal effect of the demurrer was to admit the facts but not the conclusions of law stated in the information, and upon the facts as alleged we are of opinion that the demurrer was properly sustained.

There has been no lapse or break in the corporate existence of the gas company since the date of its original incorporation, and the fact that the charter has twice been amended to avoid a forfeiture to which it otherwise would have been exposed, is material here only in so far as the necessity for such amendments may bear upon a proper construction of the franchise granted to it by the municipality.

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And the same may be said as to the fact, stressed by counsel for the city, that the original franchise was granted to the company, and not in terms to its successors and assigns.

We do not understand that any serious question is raised before us as to the legislative authority of the town or city to grant a franchise for the use of its streets. There are some contrary expressions in the brief for the city, but the case has, in the main, been presented to us upon the apparent assumption that the authority existed. Such authority, of course, was necessary. (Lile's Notes on Municipal Corporations (1922), sec. 58, and authorities cited); and it was conferred, if not otherwise, by section 23 of chapter 56, Code 1849. See *Va.-W. P. Co.* v. *Clifton Forge*, 125 Va. 469, 487.

The controversy presented by the record and the arguments of counsel with respect thereto gives rise to these two main questions: First, what is the proper construction to be placed on the contract between the gas company and the municipality; and, second, what, if any, was the effect upon that contract of the amendment or extension of the company's charter granted by the State Corporation Commission in May, 1911?

1. It can hardly be said that the language of the resolution adopted by the town council in 1853, unaided by extrinsic evidence, is sufficiently definite and unambiguous to constitute a safe guide in arriving at the intenton of the parties. No time is fixed therein for the termination of the period during which the company was to use and occupy the streets for the distribution of gas. The company was to have an *exclusive* privilege for fifteen years, and its property was to be exempt from town taxes for ten years, but the resolution does not expressly say, and does not necessarily imply, that the right to use the streets was to cease at the end of fifteen years. We must look, therefore, to the situation of the parties when the contract was made, the

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subject matter, the purposes to be accomplished, and particularly to the subsequent construction which the parties themselves have placed upon it. *Virginian Ry. Co.* v. *Avis,* 124 Va. 711, 716; *Knopf* v. *R., F. & P. R. Co.,* 85 Va. 769, 778; *Butler Bros.* v. *Virginian Ry. Co.,* 113 Va. 28, 35.

It is quite true that grants of this character are to be strictly construed. *Norfolk & P. Traction Co.* v. *Norfolk,* 115 Va. 169, 173; *Blair* v. *Chicago,* 201 U. S. 400, 471, 50 L. Ed. 801, 830; *Detroit U. R. Co.* v. *Detroit,* 229 U. S. 39, 44, 57 L. Ed. 1056, 1059; *Russell* v. *Sebastian,* 233 U. S. 195, 205, 58 L. Ed. 912, 921. But, as said by Mr. Justice Hughes, in the case last cited, "this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey." And, in construing such grants, the courts have been careful to extend a reasonable and just protection to public utility corporations whose investments have necessarily been based upon calculations of future growth and development. *Russell* v. *Sebastian, supra; Louisville* v. *Cumberland Telephone & Telegraph Co.,* 224 U. S. 649, 664, 56 L. Ed. 934, 940; *N. O. T. & L. Co.* v. *State of Ohio,* 245 U. S. 574, 585, 62 L. Ed. 481, 488; *People ex rel. Woodhaven Gaslight Co.* v. *Deehan,* 153 N. Y. 528, 533, 47 N. E. 787.

The promoters of the project, Perdicaris and Hoy, through whom the franchise was granted to the contemplated and subsequently incorporated Portsmouth Gas Company, proposed to install, equip and operate a public service plant which would necessarily involve an initial expenditure of a large sum of money, which would require many months for its completion, and which would in its development as a paying proposition involve further large outlays and extend over a long period of years. The gas company at that time had not been incorporated, and for this reason nothing in the charter thereafter granted can be looked to in construing the resolutions of the town council. The above-

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mentioned promoters from a northern city were manifestly undertaking the enterprise as an investment, and were asking an assurance for the proposed company of "protection and encouragement" from the town. On the other hand, the town authorities desire to give "proof of the favor with which they would regard the erection of gas works to supply the citizens with a cheap, beautiful and much-needed light." Both parties evidently contemplated a public utility of a permanent, costly and extensive character.

That the franchise was not regarded as limited in its duration by the fifteen years during which it was to be exclusive is clearly shown by the fact that for more than sixty years the gas company has been "using the streets, alleys and lanes of the said town or city to furnish gas to the inhabitants of the town and of the city of Portsmouth, and has continuously during said period, pursuant to contracts made between the Portsmouth Gas Company and said town and city, in accordance with resolutions passed by the council of said town and city, furnished gas for the streets and public buildings of the municipality of the town and city of Portsmouth." This fact, unequivocally alleged in the information, would seem to preclude any contention that the parties construed the franchise as limited in duration by the fifteen years mentioned in the resolution, or by the potentiality that the charter of the gas company might expire by legislative limitation, first in 1884 and again in 1914.

It is conceded by counsel for the city that there is a clear distinction between a franchise to be a corporation and a franchise to have and use and hold rights which are contractual and proprietary in their nature; and also that a corporation can take a franchise of the latter class for a period longer than its corporate existence. And it is further conceded that a franchise by a municipality to a public service corporation need not always be granted expressly or in writing, but may be conferred by implication. These propositions are important in this case, but it will be un-

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necessary, by reason of the concessions stated, to add to the length of this opinion by any discussion or citation of the authorities by which such propositions, if not admitted, might be sustained.

If we correctly grasp the contention of the city, it is that, as to the use of the streets and alleys, the only purpose of the resolutions by the town council in 1853 was to confer on the company an *exclusive privilege* for fifteen years, and that in all other respects the company has all the while been acting solely under the special legislative authority conferred by the charters granted to it in 1854 and 1884, respectively.

This contention, as already indicated, seems to us to be conclusively answered by the city's own allegation in the information that the company has continuously, since 1854, used the streets and alleys pursuant to contracts made with the town and city. If, however, it can be supposed that the facts alleged do not conclusively answer such contention, and that the same is, therefore, debatable, then of course the pertinent provisions of the company's charter may well have a material bearing upon the construction to be placed upon the contract between the company and the municipality. In other words, if there be room for doubt as to whether the town or city intended to consent to the company's use of the streets, either for an indefinite period or for a period limited by the company's charter, then the question whether the company, in view of its charter rights, needed any authority from the town other than the exclusive privilege and the tax exemption may well be considered in arriving at the intention of the parties. If such authority was not needed, it is not unreasonable to argue that it would not have been asked for or granted.

The answer to this argument is twofold. In the first place, when the contract was made in 1853 between the town and the promoters, the charter of the contemplated gas company was not in existence, that charter having been granted

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by an act of the General Assembly passed some months later. Whether the proposed charter had ever been drafted at that time does not appear, and just what its provisions would be could not in any event have been known until the Legislature acted. We cannot say, therefore, that the parties contracted under the influence of powers or limitations created by the charter.

But, in the second place, we are unable to accede to the view that the company, under its charter, would have had the unqualified right to use the streets without the consent of the town, and therefore, in our opinion, the argument under consideration is fundamentally unsound.

Section 4 of the charter of the gas company, granted to it in 1884, was as follows: "The said company is hereby authorized to open streets, lanes, alleys and public squares of said town for the purpose of distributing gas; but the said company shall repair any injury done thereby at its own cost in such manner as shall be prescribed by the council of said town." But section 2 of that charter provided that the same should be "subject to all the provisions prescribed in chapters 56 and 57 of the Code of Virginia (Code 1849), except so far as this act may otherwise prescribe."

The provisions of chapters 56 and 57 of the Code of 1849, which are material in this connection are section 23 of chapter 56, and section 37 of chapter 57. Section 23 is as follows: "No company shall occupy with its works the streets of any town until the corporate authority of the town shall have assented to such occupation, unless such assent be dispensed with by special provision of law." And section 37, while of somewhat doubtful application to a gas company, must, under the concessions in this case, be held to have limited the charter of the company to thirty years from the date of its passage.

The charter of the company having been expressly made subject to the provisions of chapters 56 and 57 of the Code of 1849, "except so far as this act may otherwise prescribe,"

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we think it is clear that under and by virtue of section 23, above quoted, it could not lawfully have occupied the streets without the consent, expressed or implied, of the city of Portsmouth. It is argued on behalf of the city that the words "except so far as this act may otherwise prescribe," in section 2 of the charter, and the words "unless such assent be dispensed with by special provision of law," in section 23 of chapter 56 of the Code, may be so construed as to mean that section 4 of the charter, quoted above, gave the company the right to use the streets without the city's consent. We do not think so. Ever since the Code of 1849 went into effect, it has been the general policy of this State to require that the consent of municipalities shall first be given before their streets shall be occupied by the works of any corporation for public improvement. (Code 1849, chap. 56, sec. 23; Code 1860, chap. 56, sec. 23; Code 1873, chap. 56, sec. 24; Code 1887, sec. 1093; Va. Const., sec. 124.) An exception to that policy, to be recognized, would have to be very clearly created. There are reasons, apparent upon comparing the charter of the gas company with certain provisions of chapters 56 and 57 of the Code, which will readily show the propriety of, if not indeed the necessity for, the words "except so far as this act may otherwise prescribe," but we need not prolong this discussion by a recital of these reasons. Suffice it to say that, in our opinion, the provisions of section 23, above quoted, constituted a limitation upon the rights granted to the company by section 4 of its charter, and that in occupying with its gas works the streets of the town and city of Portsmouth, it acted under the joint authority derived from its charter and from the municipality.

The case of *Wheat* v. *Alexandria*, 88 Va. 742, is relied upon with great confidence by counsel for the city to sustain the proposition that the charter constituted an unconditional grant of authority to the gas company to open the streets, and that such grant did not depend upon any con-

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sent from the city. The decision in the *Wheat Case*, however, even if it could not be otherwise distinguished from the case before us, cannot be relied upon as authority here. This is clearly true, not only because the charter of the Alexandria Water Company was not, like that of the Portsmouth Gas Company, made subject to a limitation contained in the general law, but for the more conclusive reason that section 23 of the Code of 1849 was not in force when the act incorporating the Alexandria Water Company became effective. That act was passed March 22, 1850, and was in force from its passage. (Acts 1849-50, p. 145.) The Code of 1849 did not take effect until July 1, 1850. (Code 1849, chap. 216, sec. 1.) For this manifest reason, section 23 had no influence upon the decision of the *Wheat Case*.

The consent of the municipal authorities in Portsmouth was necessary to enable the company to occupy and use the streets, and this consent was undoubtedly given by the resolutions of the council, and by long subsequent conduct on the part of the town and city. This conduct was not limited to a mere acquiescence, but extended to an active recognition of the company's rights from 1854 to about the time this proceeding was instituted.

"No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision, and in such case it has been said that so far as the Constitution is concerned, such consent may be either express or implied. And it has been held that the consent of the municipality required by statute *may be presumed* where the streets of the municipality have been used for a long period of years by the company under such circumstances as amount to a claim of right to use them." Dillon on Municipal Corporations (5th ed.), section 1227.

"A franchise once granted to use the streets, with *no limit as to time*, and no right of revocation reserved, is usually construed as *perpetual*, after acceptance and user,

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so long as a grantee observes the conditions under which the grant is made." Lile's Notes on Municipal Corporations (3d ed., 1922), section 60. *Russell* v. *Sebastian*, 233 U. S. 195, 58 L. Ed. 912, 921. See also *Walla Walla* v. *Water Co.*, 172 U. S. 8, 43 L. Ed. 341, 345; *People* v. *Central Union Telephone Co.*, 192 Ill. 307, 85 Am. St. Rep. 338.

2. Having reached the conclusion that the resolutions of 1853, coupled with the subsequent course of dealings thereunder between the parties, must be construed as vesting in the gas company a franchise for the use of the streets and alleys for an indefinite period, we come now to the question as to the effect thereon of the extension of the charter applied for and allowed in May, 1911, by the State Corporation Commission. The answer to this question involves a consideration of sections 124, 125 and 158 of the Constitution of 1902. These sections, so far as material here, are set forth below.

"124. No * * * gas * * * company * * * shall be permitted to use the streets, alleys or public grounds of a city or town without the previous consent of the corporate authorities of such city or town." This section merely carried into the Constitution the legislative requirement which had been a part of the general law of this State since July 1, 1850.

Section 125 provides that no franchise to a gas company can be granted by a municipality except by sale to the highest bidder after advertisement, and limits all such franchises to a period of thirty years.

"158. Every corporation heretofore chartered in this State which shall hereafter accept or effect any amendment or extension of its charter shall be conclusively presumed to have thereby surrendered every exemption from taxation and every nonrepealable feature of its charter and of the amendments thereof, and also all exclusive rights or privileges theretofore granted to it by the General Assembly and not enjoyed by other corporations of a similar general

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character; and to have thereby agreed thereafter to hold its charter and franchises and all amendments thereof subject to all the requirements, terms and conditions of this Constitution and of any laws passed in pursuance thereof, so far as the same may be applicable to such corporation."

Sections 124 and 125 have no application to this case. The gas company had acquired from the city the right to use the streets before the new Constitution was adopted. The sections in question are not intended to operate retrospectively. To hold otherwise would violate elementary rules of construction. *Arey* v. *Lindsay*, 103 Va. 250; Black on Interpretation, p. 20; Cooley's Const. Lim. (7th ed.), p. 97. Furthermore, it cannot be thought that a retrospective effect was intended by the framers of the Virginia Constitution, because that would impair the obligation of the contract and would deprive the company of its property without due process of law, and thus violate Article 1, section 10, clause 1, of the United States Constitution, and section 1 of the fourteenth amendment thereto. *Russell* v. *Sebastian, supra; Va.-W. P. Co.* v. *Clifton Forge*, 125 Va. 469, 480-482.

Nor does section 158, above quoted, have any material bearing upon the question here at issue. The object of that section was to make it obligatory upon corporations which thereafter obtained amendments or extensions of their charters to surrender every exemption from taxation, and every nonrepealable feature of their charters and all exclusive rights or privileges theretofore granted to them, and to thereafter hold their charters and franchises and all amendments thereof subject to the terms of the new Constitution *so far as the same might be applicable.* We have here no question involving any exemption from taxation, any nonrepealable feature of a charter, or any exclusive right or privilege. The section of the Constitution under consideration cannot, in our opinion, be construed as interfering with any of the proprietary or contractual rights

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of corporations acquired prior to any amendments of their charters by the State Corporation Commission. The regulation and supervision of their business, and the extent of their corporate powers may be very materially affected by amendments procured under section 158, but their property rights are not thereby surrendered. Nothing contrary to this view was held or implied in *Winfree* v. *Riverside Cotton Mills*, 113 Va. 717, cited and relied upon by counsel for the city.

We are of opinion that the charter of the gas company granted by the General Assembly in 1854 empowered the company to lay its pipes in the streets of the town of Portsmouth only after obtaining the consent of the town; that the resolutions of the town council in 1853 gave such consent, and have been so acted under in subsequent years as to have conferred upon the gas company the consent of the municipality for an indefinite time, and to have constituted a contract which vested a property right in the company; that the limitation on the corporate existence of the company to thirty years in its first and second charters did not operate to limit the period for which the consent of the city was given; that sections 124 and 125 of the Constitution were not intended to operate retrospectively, and have no effect on the question here involved; and that, from these conclusions, it necessarily follows that the limitations contained in section 152 of the Constitution have no application to the case.

There was no error in the judgment complained of, and the same will be affirmed.

Affirmed.

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CHANDLER *v.* CHANDLER.

(Wytheville, June 15, 1922.)

1. DIVORCE—Desertion—Jurisdiction of Court—Domicile of Plaintiff—Code, sec. 5105—Residence of Wife.
2. IDEM.—Constructive Desertion—Withdrawal of Sexual Intercourse Evidence—Code, sec. 5103.

Appeal from Corporation Court of city of Alexandria.

Affirmed.

T. Morris Wampler, for the appeallant.

J. K. M. Norton, for the appellee.

West, J., absent.

The decree under review granted the husband, the appellee, an absolute divorce, on the ground that the wife, the appellant, willfully deserted and abandoned him, without just cause or excuse, more than three years prior to, and continued such desertion for that period next preceding, the institution of the suit.

The suit was instituted by the husband on November 1, 1919, in the Corporation Court of Alexandria, Va.

The bill alleged willful desertion on the part of the wife in 1912, and since continued, as the ground for the absolute divorce sought. There was an answer and separate cross bill filed by the wife. The answer denied that the husband was a resident of the city of Alexandria at the time he brought the suit, and that he had had his domicile in the State of Virginia for one year next preceding the suit; stated that the wife resided in the city of Washington at the time of the suit, and denied the allegation of desertion contained in the bill. The cross bill contained the same denials and allegations as the answer on the subject of the residence and domicile of the husband and the residence of the wife, alleging that if the husband's domicile was in Virginia, so was the domicile of the wife; and alleged insuf-

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ficent support, also cruelty, consisting of striking and beating "with the fist on many occasions" and, specifically, on a particular occasion mentioned in October, 1919, on the part of the husband; and prayed for a divorce from bed and board, for maintenance, alimony, etc.

There was testimony taken by both sides, most of it being heard *ore tenus* by the judge of the court below.

There were five children born of the marriage—a daughter, in January, 1901; twins, a boy and girl, in September, 1903; another child, in 1909, which lived only a few days, and another son, born in May, 1912. All of the children mentioned were living at the time of the suit, except the infant that died, as just stated.

There was no actual desertion of the husband on the part of the wife until a few days before the suit was instituted. According to the preponderance of the evidence, the wife did then leave the home of the husband, and rented and occupied a separate place of abode from the husband in the city of Washington, the exact location of which was unknown to the husband at the time he brought the suit, he merely knowing at the time of suit that she was living somewhere in that city. The desertion which was the basis of the decree under review was constructive desertion, consisting, in accordance with the preponderance of the evidence, in the willful withdrawal from the husband, without just cause or excuse, more than three years prior to suit, of the privilege of sexual intercourse, and the continuance of such withdrawal down to the time of suit, accompanied by gross neglect of the duties of a wife in attention to the keeping of the room of the husband and his bed in any reasonable condition of cleanliness or comfort, and neglect of such duties in respect to the meals of the husband. And, in accordance with the preponderance of the evidence, such desertion was preceded by repeated and violent abuse of the husband by the wife, accompanied by repeated charging of the husband with adultery, during a

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period of some twelve years prior to the three-year period antedating the suit, continuing up to the time of the desertion aforesaid, and afterwards, down to the time of suit, which charges were groundless, so far as disclosed by the evidence, but which brought on repeated and innumerable quarrels between the parties during these long years, which embittered the lives of both and practically destroyed the existence of any real home more than three years before suit.

The evidence is voluminous, conflicting, distressing and revolting in many of its disclosures. It does not show that the husband was blameless—far from it. Indeed, there was much that was reprehensible in his conduct and which must be condemned. But there were extenuating circumstances in his favor, and none equally so in favor of the wife. Her misconduct appears to have been the inciting cause of the deplorable results which followed. It would serve no useful purpose to set forth the evidence in detail. It is deemed sufficient to say here that the clashes and quarrels frequently resulted in personal conflict, in which, on one occasion, soon after the marriage of the parties (which was in 1899), the husband, on being charged by the wife with being too intimate with another woman, lost control of himself, in his anger, and threw the wife across the bed and choked her. This, the wife testifies was the most violent assault the husband ever made upon her. In other subsequent quarrels, all brought on, as the wife practically admits in her testimony, by the wife's charging the husband with improper conduct, now with one, now with another suspected woman, the husband slapped the wife, as he admits in his testimony. In short, the result was a home—if it could be called a home—wrecked of all happiness and unfit for the proper upbringing of the children, many more than three years before suit. With respect to the beatings of the wife by the husband, the wife testified that: "They were vicious in his attitude. He never struck

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me very hard." The evidence as to nonsupport need not be further referred to than to say that it was conflicting. Moreover, the testimony of the wife discloses that she did not leave the home when she did—a few days before the suit was brought—because of the nonsupport or the cruelty of conduct aforesaid on the part of the husband, but for other reasons, which are immaterial to the issues in this cause.

As bearing on the question of the jurisdiction of the court raised by the answer and cross bill, the uncontroverted facts shown by the evidence are as follows:

The husband was born in Petersburg, Va. He lived there until 1912, having been married there in 1899, as aforesaid. He registered and voted there, and never thereafter transferred his registration to or voted at any other place. About thirteen years after his marriage, being an agent for a life insurance company and having to travel in different sections of the country, he rented a house and located his family in Lynchburg, Va., coming home at intervals as his work permitted, until 1918, when, having been sent by the insurance company which employed him to the city of Washington to take charge of the work of the company there, he moved his family to that city on September 15, 1918, and lived there, in a rented house, until October 30th when his wife having left his house, as aforesaid, he went over to Alexandria and rented a room, on October 31, 1918, taking with him one of the children (whom the wife refused to allow to stay with her at her aforesaid separate place of residence and had directed to go with his father), and the husband and son slept in this room at night from the last-named date until the latter part of December, 1918, shortly before Christmas, when he rented and occupied a room in Washington city.

Further: The husband testified that he had never formed any intention of changing his domicile from Petersburg, Va.; that he had always regarded that as his

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home; that his business was such that his location at any place for any certain length of time was problematical; that that was true also of his location in Washington city; that prior to the suit, he had claimed exemption from jury service in that city on the ground that his domicile was in Virginia, and the exemption had been allowed by the court in that city; that he was a *bona fide* resident of Alexandria on November 1, 1918, when this suit was instituted by him; that he rented the room, which he occupied there, as aforesaid, because his tenancy of the house he had previously rented and occupied with his family, in Washington, terminated October 31st, and because rents were so high at that time in that city. And there was other testimony of several witnesses, other than the husband, corroborating him with respect to the truth of the above statement of facts.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

There are but two questions presented for our decision by the assignments of error—first, whether it appears from the record that the domicile and residence of the husband, the plaintiff, was such that the court had jurisdiction of the cause; and, second, whether there was sufficient evidence before the court below to establish the fact of the constructive desertion and accompanying circumstances relied on by the husband, and, if so, whether such desertion is ground for divorce in this State. These questions will be disposed of in their order as stated below.

1 }

1. Does it appear from the record that the husband, the plaintiff, had been domiciled in this State for at least one year next preceding the commencement of the suit; that he was domiciled in this State at the time of bringing the suit; that the wife, the defendant, was not a resident

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of this State, and that the husband was a resident of the city of Alexandria (in which city the suit was instituted) at the time the suit was commenced?

This question must be answered in the affirmative.

The jurisdiction of our courts to grant divorces being a special statutory and limited jurisdiction, all of the facts in question concern not merely the venue but are jurisdictional, under the provisions of the statute on the subject (contained in section 5105 of the Code—the amendment of the statute by subsequent act of Assembly not being in force when this suit was instituted). Lile's Eq. Pl. & Pr., secs. 399-403, and authorities cited. Nothing that is said in *Towson* v. *Towson,* 126 Va. 640, 19 Va. App. 610, was intended to controvert this principle. The expression in the opinion in that case with respect to venue was not necessary to the decision, and was inadvertently used. In the instant case, however, all of the facts in question affirmatively appear from the record. They are affirmatively alleged in the bill, and such allegations are sustained by the proof, without any conflict whatever in the evidence.

As shown by the uncontroverted evidence, the domicile of origin of the husband, the plaintiff, was in Virginia. That fact of itself, when shown, was *prima facie,* and, hence, sufficient evidence to establish the fact that the plaintiff's domicile continued unchanged from his birth to the time of suit, and so had been in Virginia, for more than one year prior to the commencement of the suit; unless the abandonment of that domicile by the acquisition of a new domicile of choice affirmatively appeared from the evidence. Minor's Conflict of Laws, sections 29, 31. Whether one has acquired a domicile of choice, and has thereby abandoned or lost his domicile of origin is, in some cases, an intricate and difficult question, but not so in the instant case. The principles governing the subject of the acquisition of a domicile of choice are well settled. Minor's Conflict of Laws, secs. 56-64; *Cooper* v. *Com.,* 121 Va. 338,

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14 Va. App. 277; *Towson* v. *Towson*, 126 Va. 640, 19 Va. App. 610; *Lindsay* v. *Murphy*, 76 Va. 428; *Yates* v. *Yates*, 115 Va. 678, 8 Va. App. 430. There is no evidence in the cause before us even tending to show that any of the essential requisites for the acquisition of a domicile of choice existed. All of the evidence is, indeed, to the contrary.

This being a case in which the plaintiff exercised the option given him by statute of bringing the suit "in the * * * corporation of the plaintiff's residence," the fact that the defendant was "not a resident" of the State of Virginia (being one of the conditions upon which such option is given by the statute), became jurisdictional. But what is held in *Towson* v. *Towson*, *supra* (126 Va. 640, 651-2), with respect to the meaning of the word "resident," as distinguished from the meaning of the word "domiciled," as both are used in the statute, is equally applicable to the meaning of the word "resident" as applied to the defendant wife in the cause before us. See, to the same effect, Minor's Conflict of Laws, section 20, and authorities cited. Even if the wife's domicile still remained the same as that of her husband at the time of the suit, and the domicile of the wife was then also in Virginia; still, at that time, according to her own testimony, she occupied a separate place of abode in the city of Washington, and, hence, was a resident of that city, and was then, within the meaning of the statute, "not a resident" of Virginia. Her then place of abode, or habitation, for the time being, was not in this State. Such a place of abode, or habitation, as contradistinguished from the place of mere transient, or, under some circumstances, even daily presence, for business or pleasure, is the place of one's residence within the meaning of the statute under consideration, as it is of statutes of limitations, attachment statutes, and the like. One may be domiciled in one State and be a resident of another within the meaning of such statutes.

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Griffin v. *Woolford,* 100 Va. 473; *Long* v. *Ryan,* 30 Gratt. (71 Va.) 718; *Frost* v. *Brisben* (N. Y.), 19 Wendell 11, 32 Am. Dec. 423, and note pp. 427-8; *Atkinson* v. *College,* 54 W. Va. 32.

2. (a) Was there sufficient evidence to sustain the finding of the decree under review of the fact of the willful withdrawal by the wife from the husband of the privilege of sexual intercourse, without just cause or excuse, more than three years before suit and the continuance of such withdrawal for that period next preceding the suit; and, if so (b), was such constructive desertion sufficient ground, under the accompanying circumstances shown to exist in this case, to sustain the decree of divorce, under the Virginia statute (contained in section 5103 of the Code)?

Both branches of the question must be answered in the affirmative.

(a) While the evidence on the subject is conflicting, there was sufficient testimony for the plaintiff husband, if credible, to establish the fact of the constructive desertion in question, and that it was accompanied by willful conduct on the part of the wife, consisting of groundless charges by the wife of infidelity on the part of the husband, and of neglect on the part of the wife of her marital duties with respect to attention to the keeping of the room of the husband and his bed in a reasonable condition of cleanliness and comfort and with respect to his meals which practically destroyed all home life in any true sense, made it an unfit environment for the proper rearing of the children, and rendered the marriage state almost intolerable and impossible to be endured. All of the testimony of these subjects was heard *ore tenus* by the learned judge of the court below. He had the opportunity of observing the witnesses and their demeanor while testifying. In cases involving the mere weight of the testimony, his decision upon the facts is entitled to great weight. (See the discussion of this subject in *Barnard* v. *Barnard,* 132

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Va. —, 25 Va. App. 199. We must, therefore, hold the facts to be concluded; and that the facts were those which the testimony for the plaintiff tended to establish, as we have stated above.

(b) Upon the legal question involved, the following will be said:

The statute in Virginia (sec. 5103 of the Code) provides that: "Where either party willfully deserts or abandons the other for three years," the divorce may be decreed "to the party abandoned."

There is very high authority for the position that, in principle, and in accordance with "the adjudged law, speaking through its principles, rather than by a resolving of the exact question," the mere withdrawal of sexual intercourse without just cause or excuse, constitutes willful desertion. 1 Bish. on Mar. & Div. (6th ed.), secs. 779, 782; *Whitfield* v. *Whitfield*, 89 Ga. 471; *Axton* v. *Axton* (Ky.), 206 S. W. 480. But see the comment or Mr. Bishop's position in *Fritz* v. *Fritz* (Ill.), 14 L. R. A. 685, and in note to that case, pp. 685-6.

In some jurisdictions the courts go to the opposite extreme of holding that so long as the husband and wife live under the same roof, there can be no desertion which will authorize a divorce; that there must be an abnegation of *all* of the duties of the marital relation to constitute desertion. This holding, however, except in the State of Massachusetts (where, as pointed out by Mr. Bishop, the decisions have not been uniform on the subject), seems to be based on the language in the statutes involved in the respective jurisdictions where such holding obtains, which is more restrictive than that found in the Virginia statute. For example, in Iowa it is so held; but there the statute authorizes the wife to obtain a divorce from the husband "only when he willfully deserts the wife and *absents* himself without reasonable cause for the space of two years." *Pfannebecker* v. *Pfannebecker*, 133 Iowa 425; *Lambert* v.

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Lambert, 165 Id. 367. Also, in Pennsylvania, where the statute requires the applicant for divorce on that ground to prove "willful and malicious desertion and *absence from the habitation* of the other, without reasonable cause, for and during the space of two years." *Wacker* v. *Wacker,* 55 Pa. Sup. Ct. 380; *Cunningham* v. *Cunningham,* 60 Pa. Sup. Ct. 622. Likewise in Missouri, where the statute provides that "if one of the parties *absent* himself or herself without reasonable cause for the space of one year," the other party is entitled to a divorce. *Williams* v. *Williams,* 121 Mo. App. 349; *Gruner* v. *Gruner,* 183 Id. 157. So, too, in Maine, where the statutory requirement is "*utter* desertion." *Stuart* v. *Stuart,* 78 Me. 548. And in *Fritz* v. *Fritz,* 138 Ill. 436, 14 L. R. A. 685, strongly relied on for the defendant wife in the instant case, the allegation of the bill was that the wife "has willfully *absented* herself," etc., and, without having the statute before us, we presume that such was the language of the statute involved. (The italics in the above quotation are supplied.)

There is, however, a middle ground, on which many courts meet in their view of the subject under consideration.

This is said in *Stewart* v. *Stewart,* 78 Me. 548, 551: "In England, formerly, divorces were not allowed for desertion. The only remedy for such a wrong was a suit in the ecclesiastical courts for restitution of conjugal rights. But, those courts, while requiring the offending party to return and live with the libellant, never undertook to compel the granting of sexual intercourse. They made a clear distinction between 'marital intercourse' (sexual intercourse) and 'marital cohabitation' (living together). The latter was a right to be enforced by the courts; the former was a right to be enforced only *in foro conscientiae.* Lord Stowell, in *Foster* v. *Foster,* 1 Hag. Con. 154, said: 'The duty of matrimonial intercourse cannot be compelled in this court, though matrimonial cohabitation may.'" The

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same thing is said, in substance, in many of the authorities on the subject.

And, accordingly, many of the courts hold that mere withdrawal of sexual intercourse, although based on no just cause or excuse, where the marital duties are otherwise performed, does not constitute desertion. *Southwick* v. *Southwick,* 97 Mass. 327; *Segelbaum* v. *Segelbaum,* 39 Minn. 258; *Reid* v. *Reid,* 21 N. J. Eq. 331; *Anonymous,* 52 N. J. Eq. 349, 889; *Steele* v. *Steele* (D. C.), 1 McArthum 505—but see the view of the chief justice expressed in his concurring opinion in this case; *Schoessow* v. *Schoessow,* 83 Wis. 553; *Prall* v. *Prall,* 58 Fla. 486; *Pratt* v. *Pratt,* 75 Vt. 432; and the other authorities to the same effect cited in *Ringgold* v. *Ringgold,* 128 Va., at p. 495, 21 Va. App. 366.

In entire accord with the principle on which the middle ground last referred to rests, the following authorities hold that the willful withdrawal of the privilege of sexual intercourse, without just cause or excuse, constitutes willful desertion, within the meaning of such statute on the subject as that in Virginia, when such withdrawal is accompanied, as in the cause before us, with such willful breach and neglect of other marital duties as to practically destroy home life in every true sense, and to render the marriage state well nigh intolerable and impossible to be endured. Such conduct, on the part either of husband or wife, is considered to be a general withdrawal from the duties of the marital relationship; and, if willfully done, without just cause or excuse, this, by the great weight of authority, constitutes willful desertion. *Ringgold* v. *Ringgold,* 128 Va. 485, 21 Va. App. 366; *Parmly* v. *Parmly* (N. J.), 106 Atl. 456; *Evans* v. *Evans,* 93 Ky. 510; *Graves* v. *Graves,* 88 Miss. 677; *Magrath* v. *Magrath,* 103 Miss. 577, 4 Am. Rep. 579.

The conduct of the defendant which, together with the withdrawal of sexual intercourse, was held to have

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"amounted to a general withdrawal from matrimonial cohabitation" in *Ringgold* v. *Ringgold,* was not the same in its particulars as that of the defendant in the instant case; but the same principle was there applied which, we think, is applicable in the instant case.

In *Evans* v. *Evans, supra* (93 Ky. 510), the statute involved provided that an "abandonment" for one year, without fault upon the part of the complaining party, was ground for divorce. The Virginia statute is practically the same in its provisions. In the opinion of the court in that case, this is said: "The evidence, in our opinion, shows an abandonment by the husband for a year. It is true he continued to live at the same place where his wife resided, until about four months before the institution of her suit; but the testimony shows that, for a year or more, he had refused *to recognize her as his wife* or to live and cohabit with her. This amounted to an abandonment, although they slept beneath the same roof." (Italics supplied.)

The statute involved in *Graves* v. *Graves, supra* (88 Miss. 677), constituted "willful, continued and obstinate desertion for the space of two years," ground for divorce. The court below found the facts to be that the withdrawal of the privilege of sexual intercourse was accompanied by the neglect of other marital duties to the extent that the parties occupied towards each other "the attitude of strangers," but they continued "to live in the same house," and the lower court held that, because of the last-named fact, there was no desertion. The appellate court, in reversing that case, said this: "The court below was correct in its finding of facts, but we cannot agree with the learned chancellor in the opinion that there can be no desertion where the parties live under the same roof * * *. Abandonment—desertion—may be as complete under the same shelter as if oceans rolled between."

The decree under review will be affirmed.

Affirmed.

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CLAY *v.* BUTLER, GUARDIAN, ET ALS.

(Wytheville, June 15, 1922.)

1. GUARDIAN AND WARD—Sale of Ward's Property—Agreement to Divide Commissions With Guardian—Illegal Contract—Locus Poenitentiae.
2. IDEM.—Illegal Contract—Public Policy—Trail by Jury—Issue Out of Chancery.

Appeal from Circuit Court of Campbell county.

Affirmed.

H. C. Featherston, for the appellant.

Wilson & Manson, Robert A. Russell and *Frank Nelson,* for the appellees.

WEST, J.:

On February 3, 1919, A. L. Butler, executor of Gertrude L. Clay, entered into a written contract with John Coles Clay, employing him to sell certain real estate and personal property in Campbell county, Va., known as the John W. Clay estate. A. L. Butler was also guardian of Alice E. and Susan I. Clay, who, under the wills of their father and mother, John W. Clay and Gertrude L. Clay, were the owners of this estate. The contract provided that Clay should have as remuneration for his services ten per cent of the selling price, and that the sale price and commissions should be subject to the confirmation of the court.

Clay found a purchaser at $86,000, and on May 14, 1919, informed N. C. Manson, Jr., attorney for the guardian, that he had agreed to divide his commissions with the guardian.

Butler, as guardian for his said wards, instituted the proper proceeding in Campbell Circuit Court to have the sale confirmed. The bill, filed by him on the first Monday in June, 1919, alleged that, while the contract called for a commission of ten per cent of the selling price, Clay had

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agreed to accept a commission of five per cent thereon, which the complainant asked to be paid.

On June 4, 1919, a decree was entered confirming the sale and directing the commissioner, N. C. Manson, Jr., to pay John Coles Clay five per centum upon the amount of the sales for his services in making the sale.

At the November term, 1919, Commissioner N. C. Manson, Jr., who had collected the cash payment for the property, submitted a report to the court setting out all the facts with reference to the agreement between Clay and Butler to divide the commissions, and filed with his report a certificate of deposit for $2,150.00, the one-half of the commissions that were to go to Butler, and asked the direction of the court as to its disposition, and that a rule be awarded against Clay and Butler, requiring them to have their respective claims to the fund determined in the cause. Butler and Clay filed answers to the rule so issued, setting up their respective claims, and each took depositions to support his claim. On November 20, 1920, a decree was entered adjudging that the contract and agreement, by which A. L. Butler was to receive one-half of the commissions on the sale, was illegal and that his said wards were entitled to receive the one-half of the commissions contracted for by their said guardian, as a condition of his consent to the sale of their property. From this decree, John Coles Clay was granted an appeal.

The appellant contends that the decree of November 20, 1920, is erroneous for the following reasons:

(1) Because there had been a *locus poenitentiae*, and the unlawful design had not been consummated, but, on the contrary, had been abandoned and repudiated by the said Clay.

(2) Because the defendant, Clay, did not stand in *pari delicto* with Butler, the guardian, who imposed upon Clay the unlawful and burdensome agreement to split the commission under circumstances which occluded Clay's freedom of will.

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(3) Because the defendant, Clay, is entitled to a trial by jury, and the court had no power to deny him this constitutional privilege and adjudicate his rights under an informal proceeding instituted merely by a rule of the court.

(4) Because the decree complained of undertakes in part to reverse and set aside a former decree of the court which could only be disturbed by regular and proper proceedings on a bill of review, or petition for rehearing, filed for that purpose.

Assignments of error 1 and 2 will be considered together, and the proper disposition of them will depend largely upon the facts shown in evidence.

1 }

Did Clay agree to divide his commissions with Butler in the event that only five per cent was allowed him for making the sale?

The written contract called for a commission of ten per cent of the selling price, subject to the confirmation of the court.

Both parties admit that they did enter into an agreement, before the suit was filed, whereby Butler was to receive one-half of the commissions which Clay collected for making the sale. Clay says he had secured a purchaser and that Butler told him if *he* did not get something out of it, *he* would not let the sale go through, and that he, Clay, made the agreement because it would be saving the work he had done, and that his agreement did not apply to the five per cent finally allowed by the court. Butler claims that he was to have one-half of whatever commission the court allowed and that the agreement applied to the five per cent just as it would have applied to the ten per cent had the court allowed ten per cent.

The entire matter of commissions, under the terms of the written contract, being left to the determination of the circuit court, and the parties not knowing whether the court would allow ten per cent, five per cent, or two and one-half per cent, it cannot be said that the admitted agree-

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ment to divide the commissions was effective only in the event that the court allowed ten per cent. It is true that Clay testified that he old Butler, after Attorney Manson informed them that he would recommend to the court to allow only five per cent, that he would not divide with Butler the commission of five per cent, and that Butler agreed to it. But Butler contradicts this, and says that he was to receive one-half of the commissions allowed by the court, regardless of the per cent allowed. W. E. Hazlewood testified that he heard Clay and Butler say there was to be an equal division of the commissions between them, and that Butler would recommend a ten per cent commission, but of course that would be subject to the confirmation of the court.

Clay informed Attorney Manson of the agreement to divide the commissions with Butler, before the suit was filed, but asked him to treat the matter as confidential. Manson expressed astonishment, and informed him that the contract was illegal and improper. A few weeks later, June 4, 1919, Clay and Butler appeared before Judge Barksdale and urged him to allow Clay a commission of ten per cent for making the sale. It further appears from the statement of Judge Barksdale, which is read as evidence by consent of parties, that when he informed Clay and Butler that he would enter a decree with a provision allowing a commission of five per cent, or not enter it at all, they made no mention of a division of commissions, and the decree seemed satisfactory to both. N. C. Manson, Jr., testified that "the statement of Mr. Clay was that the commissions on the sale were to be divided. He did not enter into any details further than this. He made no distinction between the ten per cent and the five per cent commission; nothing was said on the subject." If, as he contends, Clay was to receive one-half of a ten per cent commission or all of the five per cent commissions, it is difficult to explain his conduct in urging Judge Barksdale to allow ten per cent instead of five per cent.

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It appearing from the terms of the admitted contract for a division of the commission that Clay agreed to pay Butler one-half of whatever commissions the court allowed, the burden was on Clay to show that subsequently that contract was canceled, or so modified as not to apply to a commission of five per cent. This burden he has failed to carry, as it plainly appears from a preponderance of the evidence that Butler was to receive one-half of any commissions which the court might allow Clay.

A *locus poenitentiae* is defined as "a phrase meaning that the law affords an opportunity to withdraw from an illegal contract before it has been executed—that is, carried out."

We see nothing in the conduct of the appellant, as disclosed by the record, to show that he desired to abandon and repudiate his unlawful contract. On the contrary, he concealed from Judge Barksdale the existence of such a contract and urged him to allow ten per cent commissions, so that he would be in a position to execute it. He manifested no desire to withdraw from his illegal contract until the court decided against him; and when the court fixed the commission at five per cent he contended, without success, that his contract to divide the commissions did not apply.

We find nothing in the record to warrant the conclusion that Butler occluded Clay's freedom of will. Clay was free to enter into the illegal contract, or not, as he saw fit; and he deliberately agreed to pay Butler one-half of his commissions to institute a suit for the sale of the property belonging to Butler's wards. The man who does an illegal act and the one who pays him to perform that act are equally guilty.

In *Central Land Co.* v. *Obenchain,* 92 Va. 143, the court said:

"It may be stated as a general principle that, in all cases where a person is either actually or constructively an agent

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for another, all profits and advantages made or contracted for by him in the business, beyond the ordinary compensation to be paid him by his principal, are for the benefit of his principal." Story on Agency (8th ed.), sec. 211; 2 Pom. Eq. Jur., sec. 959; 1 Beach on Private Corp., sec. 237.

Being trustees, guardians are not permitted to make gains to themselves of trust property in their hands. 21 Cyc., p. 78.

It is a general rule that a contract or agreement cannot be enforced if it can be impeached as being opposed to public policy (Broom's Legal Maxims, 706), and the courts, having in view the good of the public and the policy of the law, will not lend their aid to enforce such a contract, *unless* they can see that to do so will defeat the object of the illegal transaction, and promote the interest of society and the policy of the law. But, where it appears that this will be the result of the enforcement of such contract, the maximum *nemo allegans turpitudinam esbaudiendus,* is rigorously applied, and the defendant will not be allowed to plead and prove his own wrong. *Cardwell* v. *Kelly,* 95 Va. 574.

In *Stark* v. *Littlepage,* 4 Rand. (25 Va.) 368, Judge Green, in discussing the maxim "in *pari delicto,*" said: "But this rule applies only in cases where the refusal of the courts to aid either party frustrates the object of the transaction and takes away the temptation to engage in contracts *contra bonos mores,* or violating the policy of the laws. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are in *pari delicto.*"

The court will consider whether the good of the public and the policy of the law will be subserved and the making of such contracts be discouraged, by enforcing the contract in the case before it, or by refusing to do so, and will do

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the one or the other as will advance the interest of the public and the policy of the law. *Cardwell* v. *Kelly, supra.*

It follows that assignments 1 and 2 are without merit.

Assignments 3 and 4 will likewise be considered together.

The appellant contends that he is entitled to a trial by jury and cannot be compelled to have his rights adjudicated upon a rule requiring him to appear and assert his rights in the chancery suit; and that the decree complained of undertakes to reverse and set aside, in part, a former decree in the cause, which could not be done except by a bill of review, or a petition for a rehearing, and that neither a bill of review nor a petition for a rehearing could be maintained.

Whether a contract is against public policy is to be determined by the *court* from all the circumstances of the case, and not by the *jury*. *Kuhn* v. *Buhl,* Ann. Cas. 1917D, p. 415.

If the appellant was ever entitled to a trial by jury, which we do not concede, he has waived that right by his failure to ask for an issue out of chancery. Besides, we are unable to see how a trial by jury would have helped him, as he admitted making the illegal contract with the guardian and failed to show that it was afterwards modified or abrogated.

Appellant relies with confidence on *Thurman* v. *Morgan,* 79 Va. 367; *Anthony* v. *Kasey,* 83 Va. 338; *Nulton* v. *Isaacs,* 30 Gratt. (71 Va.) 726. These are cases of personal judgments against parties who were not in any respect parties to the suits, based upon facts wholly unlike those in the instant case, and, therefore, are not controlling here.

The question here is the proper distribution of funds which arose in the suit, and which are still under the control of the court.

He who seeks equity must do equity. He who comes into equity for relief must come with clean hands. What is the status of the appellant when his conduct is tested by these rules?

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He entered into a contract for a division of his commissions with the guardian of the infant children, whereby the children would be deprived of what is legally their property. He revealed the existence of this contract to the guardian's attorney, who informed him that the contract was illegal, and that the commissions which he contracted to give the guardian would, under the law, go to the infants. With full knowledge of the law, he then perpetrated a fraud upon the judge of the circuit court by withholding from him the facts, and thereby getting him to enter a decree in his favor, which the judge would not have entered had he known the facts.

If a party conceals a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated. 20 Cyc., p. 17.

Having by his fraudulent conduct induced the chancellor, whose duty it was to protect the interests of the infant parties in the litigation, to enter a decree directing their money paid to him, the appellant will not be allowed to plead his own wrong, and is estopped to deny the jurisdiction and authority of the court, before the money is actually paid out, to enter a decree directing that such money be paid to said infants.

The decree complained of is clearly right, and will be affirmed.

Affirmed.

CITY OF WILLIAMSBURG v. LYELL.

(Wytheville, June 15, 1922.)

1. MUNICIPAL CORPORATIONS.—Power to Acquire and Alienate Property—Lease—Renewal—Dedication of Property to Public Use.

Appeal from Circuit Court of city of Williamsburg and county of James City.

Affirmed.

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Ashton Dovell, for the appellant.
Frank Armistead, for the appellee.

WEST, J.:

This is an appeal from a decree of the Circuit Court of the city of Williamsburg and county of James City, requiring the city of Williamsburg to specifically perform its covenant to renew a certain lease for a lot of land on Duke of Gloucester street in the city of Williamsburg.

The original lease was entered into on September 24, 1894, between the mayor and common council of the city of Williamsburg and J. B. C. Spencer and others, and by mesne conveyances became the property of John Milton Lyell.

The lease demised unto the grantees, their executors, administrators and assigns all that certain unimproved lot on the south side of Duke of Gloucester street, adjoining the Methodist church, for the period of twenty-five years next ensuing, yielding therefor the yearly sum of fifteen dollars, payable on the 24th day of September of each year, and containing the following clause: "The term of lease hereby granted being renewable at the end of the first and each succeeding term of twenty-five years at the pleasure of the said J. B. C. Spencer, R. L. Spencer and H. G. Spencer, their personal representatives and assigns."

The following are among the material facts shown in the evidence:

All the rents due under this lease have been paid. The records in the clerk's office of the Circuit Court of the city of Williamsburg and county of James City were destroyed by fire in 1865, and there is no record evidence of titles beyond that date. A map of the city of Williamsburg, drawn by Benjamin Bucktrout in August, 1800, and sketched by Robert Lively in 1867, is hanging on the wall in the clerk's office of the city of Williamsburg, which shows that there are two blocks of land, each about the

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size of a city block, one on the east and the other on the west side of England street, and lying between Duke of Gloucester street and Frances street; and two blocks of land the same size on the north side of Duke of Gloucester street, said four blocks, or squares, being located near the center of the city. The lot in litigation is a part of the southwest square, as shown on said map, and has upon it a two-story frame building, the first floor of which is a storeroom, and the second floor of which is divided into rooms used for residence and office purposes. England street, as now located between Frances and Duke of Gloucester streets, is about 100 feet west of its location as shown on said map. As England street is located on said map, it would place the property now known as the brick hotel on the west side of England street and place the old powder horn magazine either in England street or west thereof. The western square, on the south side of Duke of Gloucester street, is designated on said map as "Market Square and Magazine," and the eastern square on said map, on the south side of Duke of Gloucester street, is marked "Market Square." By a map in the library of the college of William and Mary labeled, "Map of Williamsburg, executed about 1780, not known by whom," the two squares, on the south side of Duke of Gloucester street, above mentioned, are identically as on the map in the clerk's office, except that the western square is marked "Market Square," and a picture of the powder magazine is sketched thereon, showing it to be right on the side of England street and with the word "Magazine" written to the side of the picture. The western portion of the southwestern square, as shown on said map would include property now held by the First National bank, what is known as the "Debtors' Prison," which is owned by Annie Galt, and property that is owned by Elizabeth Henley and T. H. and C. H. Hall, all of whom claim their property in fee, though the records back to 1865 do not show the property came from the city

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of Williamsburg. The southwest square also has on it the Peninsular bank, the Methodist church, and the lot leased by W. C. Johnson, now used by the city as a council chamber, the city and county jail, one-half interest in the jail lot having been conveyed to the county, the fire station and some vacant lots now held by the city. The southwest square as it now is, with England street moved one hundred feet west of its position on the map, includes ground upon which a building was once erected and used as a district courthouse, town hall and city lockup. The two squares north of Duke of Gloucester street are what is known as the courthouse green, on which is located the courthouse now used by the city of Williamsburg and the county of James City. There is, on the southeastern square, the Baptist church parsonage, the stone lot, a lot leased to banks now used by Dana as a real estate office, and a lot leased to the city school board. The original charter of the city of Williamsburg, granted by King George I of England, is now in the library of William and Mary and is considered in evidence.

To assist in a clear understanding of the facts in the case, the plat of the four squares and streets referred to in the evidence is printed herewith:

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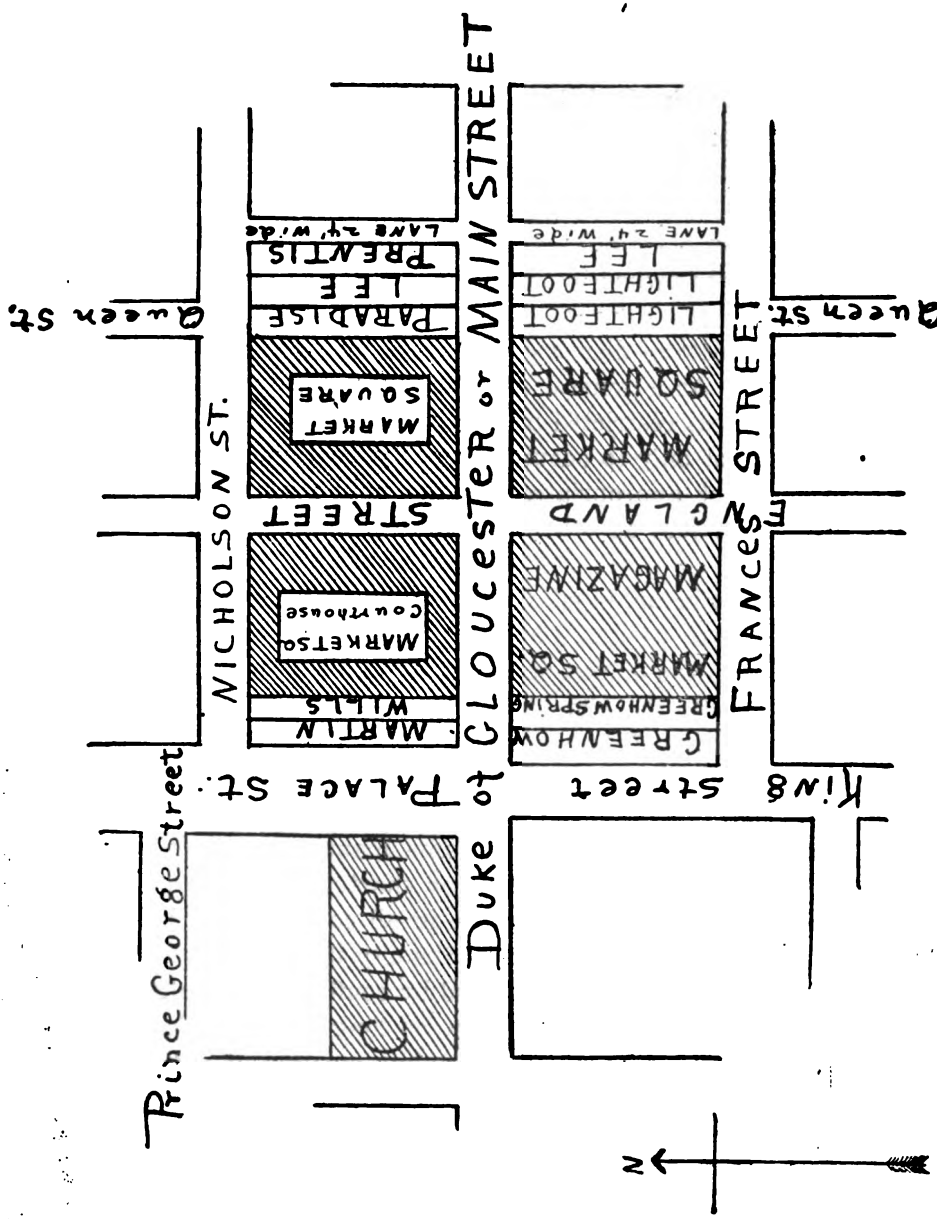

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The city of Williamsburg assigns as error the action of the court in overruling its demurrer and entering the decree complained of, its contention being that the granting of the lease in question is an *ultra vires* act on the part of the then agents of the city.

What powers has the city of Williamsburg as to the lot of land in question?

Property owned by a city for governmental purposes and appropriated for the public use is impressed with a trust, and cannot be disposed of except by valid legislative authority. As a general rule, however, a municipal corporation, unless restricted by its charter, or by statute, has the power not only to acquire property, real and personal, but, where not appropriated for the public use, may alienate the same just as other corporations, or individuals might do.

McQuillin on Mun. Corp., section 1140, states the rule thus: "All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to a public use. In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title and which is not affected by a public trust, in substantially the same manner as an individual unless restrained by statute or charter; and this power is an incidental power inherent in all corporations, public or private. Thus, land held by the city in full use and ownership—*e. g.*, commons acquired by confirmation under act of Congress—may be sold when no longer needed for public use. So, land bought for a public purpose, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold."

In 28 Cyc., at page 622, we find this: "Property held by the corporation for strictly governmental purposes may be sold or disposed of only under express legislative authority. But property held for general municipal purposes is subject to its discretionary power of use and disposal."

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Where property is acquired or held for a special purpose, as soon as that purpose is served, and the corporation has no further use for the property, it may be converted to another use, or disposed of by the municipality. *Newell* v. *Hancock*, 67 N. H. 244.

The city of Fort Wayne, Ind., purchased a tract of land for a park, but before it was actually dedicated to the public, conveyed part of it to a railroad company for a yard and shops. The court, in passing upon the validity of the deed, upheld it on the ground that the property, although purchased for a public common, had not yet been dedicated. *Fort Wayne* v. *Lake Shore Mich. Southern R. Co.*, 132 Ind. 558.

In the case of *Head-Lipscomb & Co.* v. *City of Bristol*, 127 Va. 676, 20 Va. App. 592, Prentis, J., speaking for the majority of the court, said:

"While generally speaking, property devoted to a public use cannot be sold or leased without special statutory authority, still when such use of the property has ceased and it is no longer needed it may then be sold, or leased, as the public welfare may demand. *Ogden* v. *Bear Lake, etc., Co.*, 16 Utah 440, 52 Pac. 697, 41 L. R. A. 310. While municipal corporations have no power to dispose of property of a public nature in violation of trusts upon which it is held, there is a distinction between property purchased for a public use and not yet dedicated and property purchased for that purpose which has been actually dedicated. Dedication in this connection has a definite meaning. It means: Devoted to the public use; set apart for the public use; given over to public use; appropriated for the public use."

The original charter of the city of Williamsburg gave it full power to acquire real estate. And in 1705, the General Assembly of Virginia passed an act (3 Hening's Statutes, page 419), entitled, "an act continuing the act directing the building of the capitol and the city of Williamsburg with additions," which appropriates 283 acres and

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thirty-five and one-half poles of land in James City and York counties, as shown by a certain plat therein referred to, for the building of the city which shall be forever known as the city of Williamsburg, said plat being then in the office of the General Assembly. The act provides that about sixty-three acres shall be held upon a public trust for streets and ports, designating specifically Duke of Gloucester street and the streets or roads leading from Duke of Gloucester street to two public landings, or ports, one at Queen's creek and the other at Archer's Hope creek, and a tract of land on each creek for a port. There is no mention made of public squares at any place in the city. And the act further provides for subdividing the remaining 220 acres into half-acre lots and appoints commissioners to sell the lots for building purposes and convey the titles to the purchasers. The mayor, aldermen and common council of the city are given power to purchase, receive, enjoy and retain lands, rents, tenements and hereditiments of every kind, and to grant, demise and alien the same.

Has the lot described in the lease ever been dedicated or devoted to public uses?

It is clear that under the provisions of the foregoing statute this lot was not dedicated to a public use, but rather to a private use, to be sold as the residue of the 220 acres was to be sold. The records prior to 1865 were destroyed by fire, and the two old maps referred to in the evidence are insufficient of themselves to prove a dedication to public use. At most, they tend to show that, at some later date, a market was established at some point on the southwest square, which has long since been discontinued.

This case does not, as contended by counsel for appellant, come within the rule of construction announced by the court in *Alleghany* v. *Parrish*, 93 Va. p. 615, and *Franklin Co.* v. *Gills & Johnson*, 96 Va. p. 330, for the reason that in those cases it was admitted that the property in litigation had been dedicated to public uses.

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The proof is ample that the city council has for many years treated this square, except a small portion thereof, as property not needed for the public use, and has sold a considerable portion thereof; and that it now includes property owned by one of the banks, the Methodist church, the old "Debtors' Prison," owned by Annie Galt, and property owned by Elizabeth Henley and T. H. and C. C. Hall, all claiming titles in fee. It further appears that the mayor and council have executed several leases demising to sundry parties other lots located in the same square, and were willing to renew all outstanding leases on lots heretofore leased, on the south side of Duke of Gloucester street, for shorter terms and at higher rentals.

It is manifest that the lot in question was held by the city in its private capacity and has never been dedicated to public uses, and that the city has full power and authority to lease or sell the same.

Other questions are raised in the record, but those discussed here are decisive of the case. The decree under review is plainly right and will be affirmed.

Affirmed.

CITY OF RICHMOND v. GOODWYN ET ALS.

(Wytheville, June 15, 1922.)

1. APPEAL AND ERROR.—Limitation—Amount Involved—Condemnation of Property—Interest on Compensation Awarded—Constitution, sec 88—Code, sec. 6336.
2. MUNICIPAL CORPORATIONS.—Condemnation—Interest on Awards—Code, sec. 4369, 4387.

Error to Hustings Court of city of Richmond.

Amended and affirmed.

H. R. Pollard and *Geo. Wayne Anderson*, for the plaintiff in error.

A. W. Patterson and *H. W. Goodwyn*, for the defendants in error.

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WEST, J.:

This case is before us on a writ of error to a judgment of the Hustings Court of the city of Richmond.

On November 19, 1919, a condemnation proceeding was instituted in said court by the city of Richmond to acquire, for street purposes, certain lands, a part of which belonged to the defendants in error. The commissioners appointed by the court to assess the value of such lands made and filed a report on October 23, 1920, ascertaining that the said several defendants were entitled to compensation as follows: H. W. Goodwyn, $3,151.90; J. T. Patterson, $3,-033.00; M. C. Patterson, $1,102.50—to which report no exceptions were taken. No payment or deposit was made by the city of Richmond within three months from the date of the filing of said report, and counsel for said defendants gave notice that on April 26, 1921, he would move to vacate said proceeding. Thereupon, the city called a meeting of its council and provided for the required payments, and deposited to the credit of the hustings court, in the National State and City bank, Richmond, Va., the amounts due said defendants, taking a certificate therefor, which was on the same day filed with the papers in the cause.

The city attorney immediately notified all of whom compensation and damages had been allowed, and requested of the court an order authorizing checks to be drawn in favor of all said parties. The defendants in error then, for the first time, claimed interest upon the compensation and damages allowed them; and on May 4, 1921, said report of said commissioners was confirmed, without passing upon the question of the amount of interest to which the defendants. H. W. Goodwyn, J. T. Patterson and M. C. Patterson were entitled, if any.

On May 14, 1921, James T. Patterson and M. C. Patterson, by their attorney, appeared in court, after notice of their purpose so to do, and moved the court to allow them interest at the rate of six per centum per annum from the date of the filing of the said report of said commissioners,

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to-wit: October 23, 1920, until the day on which the funds to pay said awards were deposited in bank, as aforesaid, to-wit, April 25, 1921, and additional interest at the rate of three per centum per annum from said last-mentioned date to the date on which payments should be made; and H. W. Goodwyn having indicated to the city attorney his wish to be considered as also advocating the granting of said motion, the city attorney appeared and objected to the allowance of the said interest, but the court overruled said objection and, on May 24, 1921, entered an order allowing the same. The judgment entered on said motion, allowing interest, as aforesaid, is the judgment complained of.

The plaintiff in error relies upon one assignment of error, namely:

The action of the Hustings Court of the city of Richmond in allowing the defendants in error interest, on the compensation awarded them for the properties acquired by the city, under the order of May 24, 1921.

The defendants in error rely, first, on their motion to dismiss the writ of error, because the amount involved is not sufficient to support same; and, second, on cross error, that the hustings court allowed interest to defendants in error only from the date of filing the commissioners' report: when interest should have been allowed from the institution of the proceedings.

This confines our consideration of the case to two questions:

1. Was the writ of error improvidently awarded?

2. Are the defendants entitled to any interest on the amounts awarded them as compensation for their lands, and, if so, from what date?

1

The judgment complained of allows interest to the defendants in error as follows: James T. Patterson, $98.57; M. C. Patterson, $35.84, and H. W. Goodwyn, $102.44, making a total allowance of interest of $236.85.

The defendants contend that, as they are not complain-

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ing that the city has no right to condemn, nor that the award of the commissioners is insufficient, "the controversy" here is not "concerning the condemnation of property," but concerning the payment of $236.85 allowed as interest, a matter less in value or amount than three hundred dollars, and that, therefore, the writ of error was improvidently awarded and should be dismissed.

In this contention we cannot concur.

Section 6336 of the Code (1919) reads, in part, as follows: "Any person who thinks himself aggrieved by any judgment, decree or order in a controversy concerning * * * the condemnation of property * * *, irrespective of the amount involved, * * * may present a petition * * * for a writ of error or supersedeas to the judgment or order."

The subsequent clause of this section, "except as provided in the following section," has no application to any judgment, decree or order in a controversy "concerning the condemnation of property," or concerning certain other matters therein specified.

Section 88, Article VI of the Constitution of the State of Virginia, provides, in part, as follows: The Supreme Court of Appeals "shall not have jurisdiction in civil cases where the matter in controversy, exclusive of interest and costs, and of interest accrued since the judgment in the court below, is less in value or amount than three hundred dollars, *except* in controversies concerning the title to or boundaries of land, the condemnation of property, * * * or some other matter not merely pecuniary."

It is said by this court, in *Wilburn* v. *Raines*, 111 Va. 339: "The condemnation of private property for road purposes involves the exercise of dual functions. The one, the power of eminent domain, as an attribute of sovereignty, may be exerted by the legislature directly, or it may select such agencies as it pleases and confer upon them that right; the other, the matter of ascertaining a just compensation

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for the property condemned, is judicial in its character and the owner is entitled to have that question investigated and determined by an impartial tribunal, and, under section 88, Article VI of the Constitution, with the ultimate right of appeal to this court."

The principle supporting an interest allowance is the duty and obligation to make just compensation. Whatever is an essential element in that compensation cannot be excluded, even by legislative enactment. *United States* v. *Rogers,* 257 Fed. 397.

It is manifest that where interest is allowed it constitutes a part of the "just compensation" which must be paid by the condemnor in order to secure the property desired, and involves a matter "concerning the condemnation of property" within the meaning of the Constitution and statutes already referred to.

The motion to dismiss the writ of error will be overruled.

2

This brings us to the consideration of the remaining question to be disposed of, namely: Are the defendants in error entitled to any interest on the amounts awarded them as compensation for their lands, and if so, from what date? The authorities, generally agree that interest, in a proper case, may be allowed upon amounts awarded property owners in condemnation cases, but there is much conflict among them as to when, or the time from which, it should be allowed; due in large measure to the fact that in some States the matter of allowing interest is regulated by statute.

In Mills on Eminent Domain, section 175 (499), we find this: "Interest should run from the time of the taking * * *. Interest will always run from the time of the demand. If the payment is delayed by litigation, interest should be allowed. * * * The court will always allow interest, unless a tender or deposit is made. * * * The right to use the land is not always equivalent to the interest, for the owner cannot dispose of his land, or rent or im-

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prove it. * * * Delays in payment required interest to be paid; but where there is a delay of only two days between the award and the tender of the money, the interest will be disregarded by the courts."

In 2 Lewis on Eminent Domain, the author, at section 742 (499), states the law thus: "In the absence of any statutory provisions controlling the subject, the rule in respect to interest must be derived from the constitutional provisions requiring just compensation to be made for the property taken. * * *

"Where damages are assessed for property to be afterwards taken, the award or verdict should bear interest from the time with reference to which the damages are estimated. * * * The point of time must necessarily be before the compensation can be paid. Between that time and the payment, the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it except subject to rights acquired by the condemnation. As his compensation is withheld from him, though necessarily, he should have an equivalent for such withholding, and that, in law, is legal interest. This is just to the owner. * * * While the assessed value, if paid at the date taken for the assessment, might be just compensation, it certainly would not be, if payment be delayed, as might happen in many cases. * * * It is true, until the company (city) actually takes possession, at the end of the proceedings, the owner has the legal right to possess and use the land. It cannot be assumed that the value of this legal right is equivalent to the interest on the assessed value of the land. His possession is precarious; he cannot safely improve; if he sows, he cannot be sure that he will reap. As he is not placed in this position by any act of his own, is not in as a wrongdoer, nor under any contract, there would be no justice in charging him with any assumed value of the use." But see *State Highway Com.* v. *Kreger*, 128 Va. 203, 211-12.

In *Reed* v. *Ry. Co.*, 25 Fed. 886, Judge Shiras says: "A

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consideration of the rights of the parties under the right of way act shows that it is impossible in these cases for the jury to fix by the verdict the amount of interest to be paid. Whether any interest is recoverable depends upon circumstances. * * *

"These and other like considerations show that in cases of this character, being proceedings of a peculiar nature, the only way in which the rights of all can be fully protected is for the jury to assess the damages as of the date of the assessment by the sheriff's jury, and then, upon the rendition of the verdict, for the court to make the proper order touching the question of interest. Until the verdict is rendered, it cannot be known whether plaintiff may be entitled to interest. When this is determined by the amount of the verdict, the court can then make the proper order, and the same will form part of the adjudication settling the damages. * * *"

After the commissioners have reported the value of the land condemned to the use of the United States, under act of Congress, August 18, 1890 (26 St. at Large, 316), the owner of the land is entitled to interest on the amount reported, from the time when the right of the government to take the same attaches to the time when payment for the land is made. *U. S.* v. *Engeman*, 46 Fed. 898.

Chief Justice Winslow, in delivering the opinion of the Wisconsin Supreme Court in *Appleton* v. *R. Com.*, 142 N. W. 476, says: "Just compensation must mean fair and reasonable value at the time the property is taken; just compensation for the property presently taken must necessarily mean its present value presently paid; it cannot mean its present value to be paid two years in the future without interest."

Judge Caldwell, in delivering the opinion of the court in *Alloway* v. *Nashville* (Tenn.), 8 L. R. A., states this to be the law: "The jury allowed no interest. No instructions on that subject were given or requested; but after the ver-

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dict was returned, and before judgment was entered, Alloway and wife moved the court to add interest. This the court refused to do, and his action in that regard is now assigned as error. The statute authorizing the condemnation of private property for public use, and prescribing the mode of proceeding, is silent on this subject, and the General Statutes (*Id.*, s. 2702), which enumerate instruments that bear interest as a matter of law, does not embrace a case like that before us. Nevertheless, we have no hesitation in holding, upon general principles, that interest should have been allowed from the time of the appropriation of the property * * *."

The Virginia statute concerning the exercise of the power of eminent domain is silent on the question of interest, except when, after payment into court, a report is made which is confirmed, and the sum thereby ascertained exceeds what was so paid, it is provided that the condemning party shall pay interest on such excess from the date of the award until payment thereof into court or to the party entitled thereto.

The other provisions of the statute, material to a proper consideration of the question at issue, are as follows:

Sec. 4369: "The said report * * * shall be forthwith returned to the clerk's office of such court of the county or city, where it shall remain for at least thirty days, after which, unless good cause be shown against the report, the same shall be confirmed by the court or by the judge thereof in vacation. The sum so ascertained to be a just compensation, and the measure of damages, if any, may be paid to the persons entitled thereto, or into court, and, when paid to the persons entitled thereto, the receipt for the same, when witnessed by two witnesses or acknowledged before a person duly authorized to take acknowledgments of deeds, together with the report, shall be recorded by the clerk of the court, and both the report and the receipt, when so recorded, duly indexed by the clerk. Upon

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such payment, either to the person entitled thereto or into court, and confirmation of the report, the title to the part of the land and to the other property taken for which such compensation is allowed, shall be absolutely vested in the company in fee simple * * *."

Sec. 4387: "* * * If, in any such proceeding, the amount or amounts ascertained by the commissioners, as aforesaid, be not paid either to the party entitled thereto or into court, within three months from the date of the filing of the report of the commissioners, the proceedings shall, on the motion of the party condemning or of any defendant, be vacated and dismissed as to him * * *."

While this court has been called upon in numerous cases to pass upon questions arising in condemnation proceedings, yet in only one instance has it had occasion to consider the question of the allowance of interest upon the amounts awarded as compensation, except when there were two commissioners' reports, that being the case of *Attorney General* v. *Turpin*, 3 Hen. & Mun. 549.

This case, decided in 1809, involved the securing of the title to the land on which a part of the Capitol Square at Richmond is located. The legislature passed an act in 1779 providing that six certain squares, situated in the town of Richmond, the property of Doctor Philip Turpin, be appropriated to the use and purpose of public buildings, and that reasonable satisfaction be paid for all such lots of ground as might be taken and appropriated for that purpose. The act further provided for the summoning of a jury to assess the value of the land taken. In December, 1787, the General Assembly passed an act authorizing the directors of the public buildings in the city of Richmond to convey to P. Turpin certain lands, the act reciting that the directors of the public buildings had appropriated, for the use of the public, certain lands, the property of said Turpin, since found to be unnecessary for the said purposes, and authorizing them to execute a deed conveying to said Turpin so

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much of the land so appropriated as said directors should judge unnecessary for public use. And it was further provided that the directors should cause the lands deemed unnecessary for public use to be valued by a jury, previous to the execution of a deed for same. On April 9, 1788, the directors passed a resolution declaring that a deed ought to be executed to Philip Turpin conveying to him all the lands belonging to said Turpin, appropriated by the directors for the use of the public, except two acres.

Each of the three judges—Tucker, Roane and Fleming—wrote an opinion in the case, and Judge Fleming filed, as a part of his opinion, a decree which was agreed upon as the unanimous opinion of the court. This decree ordered that the Commonwealth pay the appellee, Turpin, the value of said two acres, with interest thereon at the rate of five per centum per annum from the 9th day of April, 1788, the date of the resolution of the directors, by which the two acres were retained for public use, until the same was paid.

There was not, as suggested by counsel for the plaintiff in error, a revaluation of the land finally taken by the State, but simply a revaluation of that portion which was deeded back to Doctor Turpin, in order to ascertain the original value of the two acres retained by the State.

Whether interest on the award should be allowed must depend upon the construction of the local statute, in the light of the constitutional provision that private property shall not be taken for public use without just compensation, the report of the commissioners and all the facts and circumstances surrounding the case.

As already observed, the Virginia statute makes no express provision for allowance of interest, except where a second report is filed; and the commissioners' report, stating the amounts ascertained by them to be just compensation for the lands to be taken, makes no mention of interest.

The commissioners, in fixing such compensation, are presumed to have allowed for the inconveniences, damage and

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delay arising out of the proceedings, certainly to the date of the filing of their report, and for three months thereafter, as the statute contemplates that the party condemning may have not to exceed three months, in which to decide whether he will take the property at the valuation fixed by the commissioners, after which, if the amount ascertained has not been paid, the proceedings shall, on motion of the condemnor or either defendant, be dismissed. But, the condemnor has no right to wait an indefinite time thereafter, and then come forward and take the property at that valuation, without the payment of interest thereon. To permit him to do so would be to require the land owner to surrender his property without receiving therefor that just compensation which the Virginia statute contemplates he should receive.

Under the provisions of the Virginia statute, for the reasons suggested above, the land owner cannot demand payment of interest on the allowance of the commissioners either from the institution of the proceeding or from the date of the filing of the report; and the payment of the amount ascertained by them into court is equivalent in law to a payment of the same to the land owner, and terminates his right to demand further payment of interest thereon, certainly in a case where he is not contesting the legality of the proceeding or the award of the commissioners.

We are of the opinion, therefore, that the judgment complained of, in so far as it allows the defendants interest on the amounts awarded them by the commissioners for three months next after the filing of their report and after the payment of the said amounts into court, is erroneous.

For the foregoing reasons, the motion of the defendants in error to dismiss the writ of error will be overruled, and the judgment aforesaid will be amended in the manner indicated and entered here as it should have been in the lower court, allowing interest at six per centum per annum on

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the amounts awarded by the commissioners, from January 23, 1921 (three months after the date of filing their report), until April 25, 1921, the date on which the money was deposited in bank to the credit of the court, and costs.

Amended and affirmed.

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